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In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

GIUSEPPE GAMBINO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether a defendant who has been acquitted of conspiring to import drugs during an eight-month period may later be prosecuted for conspiracies to import and distribute narcotics during a 14-year period, where the indictment in the later prosecution names the defendant in two overt acts about which the government had introduced evidence in the earlier prosecution.

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a-14a) is reported at 920 F.2d 1108. The decision of the district court (App., *infra*, 15a-58a) is reported at 729 F. Supp. 954.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1990. A petition for rehearing was denied on February 1, 1991. On April 22, 1991,

Justice Marshall extended the time for filing the petition for a writ of certiorari until July 1, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

STATEMENT

1. In 1981, respondent was acquitted by a jury in the Eastern District of New York on charges that he conspired between August 1, 1979, and March 18, 1980, to import heroin into the United States, in violation of 21 U.S.C. 846. App., *infra*, 2a. The two-page indictment named a total of ten defendants. No overt acts are required for a conviction under Section 846, and none were named in the indictment. App., *infra*, 23a n.5; see Resp. C.A. App. 117a-118a. The 1981 trial focused on a single, abortive effort to import 40 kilograms of heroin into the United States from Italy, beginning with a phone call on March 3, 1980, and ending 15 days later on March 18, 1980, when the 40 kilograms of heroin destined for the United States were seized. App., *infra*, 2a-3a.

2. On August 30, 1989, a grand jury returned a superseding indictment against respondent and 14 co-defendants. The indictment charged respondent with, *inter alia*, conspiring to import heroin and cocaine, in violation of 21 U.S.C. 963 (Count 1); conspiring to distribute or to possess with intent to distribute heroin and cocaine, in violation of 21 U.S.C. 846 (Count 2); conducting a continuing crim-

inal enterprise, in violation of 21 U.S.C. 848 (Count 3); and conspiring to participate in the affairs of an enterprise through a pattern of racketeering activity, in violation of the RICO statute, 18 U.S.C. 1962(d) (Count 7). App., *infra*, 16a-18a.

The Count 1 and Count 2 conspiracies are alleged to have continued from January 1, 1975, through the date of the indictment. Count 1 enumerates 172 overt acts, including specific narcotics transactions, meetings, and communications between the defendants and their co-conspirators. App., *infra*, 4a. Gambino is named in 41 overt acts, the first of which is alleged to have taken place in 1978 (Overt Act 1) and the last of which is alleged to have taken place on December 1, 1988 (Overt Act 168). Of those 41 overt acts, two relate to respondent's meetings to plan the March 1980 heroin importation scheme. Overt Act 13 alleges that "[o]n or about March 9, 1980, [respondent] and Emanuele Adamita met with Frank Rolli at the Cafe Mille Luci on 18th Avenue in Brooklyn, New York." Overt Act 14 alleges that, "[o]n or about March 11, 1980, [respondent] and Emanuele Adamita met with Frank Rolli in the Villa Borghese Restaurant in Brooklyn, New York." Resp. C.A. App. 14-85. Evidence about both meetings had been introduced at respondent's 1981 trial. App., *infra*, 3a.

3. Claiming that Counts 1 and 2 were the "same offense" for double jeopardy purposes as the 1981 charges of which he had been acquitted, respondent moved to dismiss those counts. In the alternative, he asserted that principles of collateral estoppel barred introduction of evidence concerning the 1981 importation conspiracy as to Counts 1 and 2. See App., *infra*, 6a, 22a-32a.

Applying the totality of the circumstances test of *United States* v. *Korfant*, 771 F.2d 660 (2d Cir. 1985), the district court found that the conspiracy charged in the 1981 indictment was not the same as that charged in Counts 1 and 2 of the present indictment and hence rejected respondent's argument that Counts 1 and 2 were barred by the Double Jeopardy Clause. App., *infra*, 22a-26a, 31a-32a. In particular, the court relied on the following factors: that only two of the 41 overt acts charged against Gambino in Counts 1 and 2 of the present indictment concern events covered in the 1981 trial, *id.* at 24a; that Counts 1 and 2 contain detailed allegations of drug activity having no relation to the earlier charges, *ibid.*; that some of the events alleged in Counts 1 and 2 occurred after the 1981 acquittal, *ibid.*; that, apart from Gambino and a government informant, only one of the 15 defendants and 27 co-conspirators named in the instant indictment was involved in the 1981 case, *id.* at 25a; and that the 1981 case involved an importation conspiracy, whereas the Count 2 conspiracy in this case charges a distribution conspiracy, *id.* at 31a.

Although ruling against Gambino on the double jeopardy claim, the court agreed with Gambino that, in proving the Count 1 importation conspiracy, the government should be barred, on grounds of collateral estoppel, from introducing evidence of Gambino's alleged involvement in the 1980 importation scheme. App., *infra*, 26a-31a. The court concluded that "the 1981 jury simply did not believe that the government had sustained its burden of proving Gambino's guilt beyond a reasonable doubt." *Id.* at 31a. With respect to the Count 2 distribution conspiracy, however, the court declined to bar the government from proving the 1980 importation scheme. The court concluded

that the 1981 jury's acquittal of Gambino on the importation conspiracy charge did not amount to a finding that he did not conspire to distribute narcotics. *Id.* at 32a.

4. Respondent took an appeal under *Abney* v. *United States*, 431 U.S. 651 (1977), and renewed his double jeopardy arguments. While the case was pending, this Court decided *Grady* v. *Corbin*, 110 S. Ct. 2084 (1990). After considering supplemental briefing by the parties addressing the effect of *Grady* on this case, the court of appeals reversed the district court's ruling that Counts 1 and 2 were not jeopardy-barred. The court affirmed the district court's judgment in all other respects.* See App., *infra*, 14a, 59a-60a.

In reaching its conclusion that Counts 1 and 2 are barred, the court of appeals relied on its recent decision in *United States* v. *Calderone*, 917 F.2d 717 (2d Cir. 1990), petition for cert. pending, No. 90-1527. The court explained that *Calderone* had held that "the 'conduct that constitutes an offense' in a conspiracy prosecution is that conduct from which the jury may infer the existence of an agreement." App., *infra*, 10a. In the court's view, it therefore followed that "[u]nder *Grady*, this conduct may not be prosecuted a second time in order to establish an 'agreement' that differs from the first crime only in that

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* The district court had also rejected respondent's motion to dismiss the CCE charge (Count 3) and a motion by a co-defendant to dismiss the RICO conspiracy charge (Count 7) on double jeopardy grounds. Respondent and the co-defendant have filed their own petition for certiorari from the court of appeals' holdings that Counts 3 and 7 are not barred by the Double Jeopardy Clause. *Gambino* v. *United States*, No. 90-1689. We are filing a brief in opposition to that petition.

the indictment happens to describe it differently." *Ibid.* (quoting *Calderone*, 917 F.2d at 721). The court of appeals concluded that, because Counts 1 and 2 "rest, at least partially, on overt acts for which [respondent] has been previously prosecuted, they may not remain in the indictment against [respondent]." App., *infra*, 11a. The court ordered that "[u]pon remand, the district court shall consider whether to dismiss, with leave to re-present, Counts 1 and 2 of the indictment or to order redaction of the offending portions of the indictment." *Id.* at 14a.

REASONS FOR GRANTING THE PETITION

We recently filed a petition for certiorari in *United States* v. *Felix*, No. 90-1599, seeking review of a decision of the Tenth Circuit raising issues substantially similar to the issues raised in *Calderone* and in the court of appeals' disposition of Counts 1 and 2 in this case. In *Felix*, the Tenth Circuit held, *inter alia*, that *Grady* v. *Corbin* barred prosecution of a defendant for conspiracy to violate several narcotics statutes because the defendant had earlier been prosecuted for conduct alleged in some of the overt acts of the conspiracy indictment. Like the Second Circuit in *Calderone* and in this case, the Tenth Circuit reasoned that the conduct at issue in a conspiracy prosecution is the conduct from which the government seeks to have the jury infer the conspiratorial agreement. Therefore, according to the Tenth Circuit, prosecution for conspiracy is equivalent, for double jeopardy purposes, to prosecution for the overt acts (and any other conduct) from which the government seeks to have the jury infer the conspiratorial agreement. 926 F.2d 1522, 1530 (1991). Since the defendant in *Felix* had already been prosecuted for some of the conduct charged in the overt acts of his

conspiracy indictment, the Tenth Circuit concluded that prosecution on the conspiracy indictment was barred by the Double Jeopardy Clause. *Ibid.*

As we explained in our petition in *Felix*, in our view the Tenth Circuit's holding is inconsistent with basic principles of the law of conspiracy and with this Court's double jeopardy jurisprudence. As the Court has stated, "[t]he gist of the crime of conspiracy * * * is the agreement or confederation of the conspirators to commit one or more unlawful acts." *Braverman* v. *United States*, 317 U.S. 49, 53 (1942). See 90-1599 Pet. 11-12. Accordingly, it is settled law that a conspiracy is not "the same offense" as its object offenses, see, *e.g.*, *Garrett* v. *United States*, 471 U.S. 773, 778 (1985), and the government may prosecute a defendant separately for a substantive offense and for conspiracy to commit that offense. See, *e.g.*, *United States* v. *Bayer*, 331 U.S. 532, 542-543 (1947). See generally 90-1599 Pet. 11-12. The Tenth Circuit's contrary conclusion is at odds with the above principles and in addition is inconsistent with the recent decision of the Fourth Circuit in *United States* v. *Clark*, 928 F.2d 639 (1991).

The Second Circuit's decision in this case is based on the same principle that underlies the Tenth Circuit's decision in *Felix*—that the conduct at issue in a conspiracy prosecution is not the criminal agreement itself, but rather the conduct from which the government asks the jury to infer the agreement. In *Felix*, the Tenth Circuit employed that principle to hold that a conspiracy prosecution was barred because some of the overt acts charged in the conspiracy indictment had been the subject of a previous prosecution on substantive charges. In this case, the Second Circuit employed the same principle to hold that a conspiracy prosecution was barred because

some overt acts charged in the conspiracy indictment had been used to attempt to prove a prior conspiracy charge against the same defendant. This Court's disposition of our petition in *Felix* is therefore likely to resolve this case, or at least shed substantial light on its correct resolution.

CONCLUSION

The petition for a writ of certiorari should be held pending action on the government's petition for a writ of certiorari in *United States* v. *Felix*, No. 90-1599, and disposed of accordingly.

Respectfully submitted.

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JULY 1991

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Nos. 1344, 1345, Dockets
90-1104, 90-1106

UNITED STATES OF AMERICA, APPELLEE

v.

GIUSEPPE GAMBINO, a/k/a "JOE," and
MATTEO ROMANO, DEFENDANTS-APPELLANTS

Argued May 7, 1990

Decided Dec. 10, 1990

Before ALTIMARI and MAHONEY, Circuit Judges and POLLACK,* Senior District Judge.

ALTIMARI, Circuit Judge:

Giuseppe Gambino and Matteo Romano appeal from an order, entered in the United States District Court for the Southern District of New York (Peter K. Leisure, *Judge*), denying their motions to dismiss a sixth superceding indictment, SSSSSS 88 Cr. 919 (PKL), which charges them with conspiracy to im-

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* The Honorable Milton Pollack, United States District Court for the Southern District of New York, sitting by designation.

port heroin and cocaine and conspiracy to distribute heroin and cocaine. 729 F.Supp. 954. The indictment also charges Gambino with conducting a continuing criminal enterprise ("CCE"), and charges both Gambino and Romano with conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act ("RICO"). In previous prosecutions, Gambino and Romano were acquitted of conspiracy to import heroin and of conspiracy to import and distribute heroin and cocaine, respectively. According to Gambino and Romano, prosecution under the sixth superceding indictment is barred by double jeopardy principles. For the reasons set forth below, the order of the district court is affirmed, in part, reversed, in part, and remanded for the district court's consideration of whether to dismiss, with leave to re-present, Counts One and Two of the indictment against Gambino or to order redaction of the offending portions of the indictment. We affirm the court's order in all other respects.

BACKGROUND

A. *Gambino I.*

In 1981, Gambino was acquitted by a jury of charges that he conspired, between August 1, 1979 and March 18, 1980, to import heroin to the United States. *United States v. Gambino*, 80 Cr. 131 (E.D.N.Y.) (Neaher, J.) (*"Gambino I"*). In *Gambino I*, the government alleged that defendant Gambino supervised and financed a conspiracy to import in excess of forty kilograms of heroin from Italy to the United States. At trial, the government focused on a fifteen-day period, from March 3, 1980 to March 18, 1980, during which Gambino and his co-conspirators allegedly planned an ultimately unsuccessful trip to Italy for that purpose.

The government's evidence in *Gambino I* consisted primarily of testimony from Frank Rolli, a government informant who allegedly conspired with Gambino and co-defendant Emanuele Adamita in the heroin importation scheme. Rolli testified that he met with Gambino and Adamita in Brooklyn on two occasions in March 1980; that the three men discussed a plan to smuggle heroin through customs at Kennedy Airport; that Gambino agreed to pay him $30,000 for his assistance; that Rolli and Adamita travelled to Italy in order to obtain the heroin; and that, once in Italy, the amount of heroin to be imported increased from ten kilograms to forty kilograms. This heroin was seized at Kennedy Airport and Gambino was subsequently arrested, prosecuted and acquitted.

B. *Adamita.*

In 1989, Romano was acquitted by a jury of charges that he conspired to import and distribute heroin and cocaine. *United States v. Adamita*, SSS 88 Cr. 217 (S.D.N.Y.) (Sprizzo, J.) ("*Adamita*"). The indictment in *Adamita* alleged that Romano, along with 26 co-defendants, conspired to import narcotics from Italy to various cities in the United States between January 1, 1985 and June 30, 1988. The indictment cited some 105 overt acts, including the use of couriers to transport cocaine to Italy in order to exchange the cocaine for heroin and return the heroin to the United States. The indictment also alleged that legitimate businesses, including pizza parlors and a clothing store, were used as fronts to distribute the narcotics. Romano was named in four of the indictment's overt acts, including several meet-

ings with co-defendant Adamita. Romano was eventually tried, along with thirteen co-defendants, and was acquitted.

C. *The present indictment.*

On December 14, 1989, the Grand Jury returned a sixth superceding indictment, SSSSSS 88 Cr. 919, charging seven counts against some fifteen defendants, including Gambino and Romano. The indictment alleged a large-scale narcotics conspiracy, spanning almost fifteen years, and involving an international organization known as "the Mafia" or "La Cosa Nostra." Originally, both Gambino and Romano were named in Counts One and Two of the indictment. However, during the pendency of this appeal, the government determined not to pursue its prosecution on Counts One and Two against Romano. The government filed a motion, which was granted, to remand those counts to enable it to file a *nolle prosequi* as to Romano. This *nolle prosequi* will also result in the deletion of Romano's name from the corresponding RICO predicate acts.

Count One of the sixth superceding indictment charges that, between January 1, 1975 and the date the indictment was filed, the defendants participated in a conspiracy to import heroin and cocaine into the United States, in violation of 21 U.S.C. § 963 (1988). This conspiracy allegedly involved the international smuggling, as well as primary and secondary wholesale distribution, of narcotics. Count One enumerates 172 overt acts, including specific narcotics transactions, meetings, and communications between defendants and their co-conspirators. Gambino is named in more than forty of those overt acts, including two overt acts related to his participation in the March

1980 heroin importation scheme. In a seventh superceding indictment, filed shortly before the district court rendered its decision on the underlying motion, the government alleged eleven additional overt acts, all of which name Gambino.

Count Two of the indictment alleges that the defendants conspired to distribute or to possess with intent to distribute heroin and cocaine, in violation of 21 U.S.C. § 846 (1988). This count incorporates the overt acts alleged in Count One.

Defendant Gambino is charged in Count Three of the indictment with organizing and supervising a CCE, in violation of 21 U.S.C. §§ 848(a) & (b) (1988). This count incorporates the violations alleged in Counts One and Two and alleges that Gambino supervised the CCE from January 1, 1975 to the date of the indictment.

Count Seven of the indictment charges that Gambino and Romano, along with their co-defendants, conspired to conduct a racketeering enterprise, in violation of RICO, 18 U.S.C. § 1962(d) (1988). Count Seven alleges a pattern of racketeering activity consisting of forty-two predicate acts, including narcotics transactions, bribery, extortion, gambling, murder, and obstruction of justice, occurring between January 1, 1970 and the date of the indictment. The predicate acts in which Gambino and Romano are both named include: possessing more than 500 grams of cocaine with intent to distribute on or about June 29, 1987; bribing a public official in February 1987 in order to facilitate the escape from federal custody of a co-defendant; travelling interstate in March 1987 in aid of racketeering activities; conspiring to make extortionate extensions of credit from January 1, 1975 to September 1, 1989; and conspiring during

the same time period to use extortionate means to collect extensions of credit. In the seventh superceding indictment, the government alleged five additional predicate acts to support the racketeering conspiracy alleged in Count Seven.

D. *The motion to dismiss.*

On September 29, 1989, Gambino and Romano each moved to dismiss various counts of the sixth superceding indictment on the ground that prosecution on those counts violates the double jeopardy clause of the fifth amendment. According to Gambino, the overt acts alleged in the Count One importation conspiracy reflect conduct for which he was prosecuted in *Gambino I.* Further, Gambino argued that his prosecution for the Count Two distribution conspiracy is barred under the collateral estoppel principle. Gambino also argued that the Count Three continuing criminal enterprise charge is a lesser included offense of Counts One and Two and, therefore, should be dismissed. Finally, Gambino contended, in the alternative, that the government should be collaterally estopped from introducing any evidence of the March 1980 attempted importation of heroin since he was acquitted of that offense.

According to Romano, his prosecution for Counts One, Two and Seven of the sixth superceding indictment is barred by his acquittal in *Adamita.* His challenge to the prosecution of Counts One and Two is rendered moot by the government's decision to file a *nolle prosequi* on those counts. However, Romano maintains his argument that the prosecution for conspiracy to violate RICO (Count Seven) is barred by the previous prosecution of various alleged predicate acts.

In response to Gambino's motion, the government argued that *Gambino I* concerned a single, fifteen-day narcotics conspiracy, while Counts One and Two of the sixth superceding indictment allege an extensive narcotics conspiracy spanning nearly fifteen years. The government also contended that, since Count Two (conspiracy to distribute) and Count Three (CCE) are statutorily distinct offenses from the offense charged in *Gambino I*, double jeopardy does not bar prosecution on those counts. Finally, the government argued that Gambino had not met his burden of proving that his acquittal in *Gambino I* entailed a finding that he had no involvement in the March 1980 importation scheme. In support of these arguments, the government proffered much of the evidence that it intended to introduce at trial. It also summarized the evidence presented in *Gambino I* and submitted the available transcripts from that trial to the court.

With respect to Romano's challenge to Count Seven, the government argued that Romano could be prosecuted under RICO because he had never before been charged with a RICO conspiracy, nor had he previously been charged with several of the alleged predicate acts.

On January 25, 1990, the district court issued an opinion and order denying the defendants' double jeopardy challenges to the indictment. The court conducted a thorough analysis of defendants' double jeopardy claims, applying the factors set forth in *United States v. Korfant*, 771 F.2d 660 (2d Cir. 1985) (per curiam). It concluded that, under *Korfant*, Gambino's prosecution on Count One was not barred by his acquittal in *Gambino I*. It further determined that Gambino could be prosecuted on

Count Two since it alleged a statutory offense different from that alleged in *Gambino I*. Finally, since Gambino's challenge to Count Three rested on his attacks on Counts One and Two, the court rejected that challenge. The court did, however, partially grant Gambino's motion to preclude the introduction of evidence of his involvement in the March 1980 plan to import heroin. Finding that the jury's verdict in *Gambino I* reflected a judgment about the credibility of Frank Rolli's testimony, the court ruled that this evidence could not be introduced to establish the conspiracy to import narcotics alleged in Count One. Evidence of the March 1980 scheme remained admissible in the government's prosecution of the conspiracy to distribute narcotics charged in Count Two, however, because the factual issues raised by this charge differ from those raised by the importation conspiracy charged in *Gambino I*.

The district court denied Romano's motion to dismiss Count Seven, finding that it alleged significant criminal activity for which he was not prosecuted in *Adamita*.

This appeal followed.

DISCUSSION

I. *Counts One and Two.*

In reaching its decision, the district court applied the principle that the successive prosecution of conspiracies is barred by double jeopardy if "the offenses charged [are] in fact and in law the same." *United States v. Armedo-Sarmiento*, 545 F.2d 785, 792 (2d Cir. 1976), *cert. denied*, 430 U.S. 917, 97 S.Ct. 1330, 51 L.Ed.2d 595 (1977). Its determination was guided by the *Korfant* factors, which include:

> (1) the criminal offenses charged in successive indictments; (2) the overlap of participants; (3) the overlap of time; (4) similarity of operation; (5) the existence of common overt acts; (6) the geographic scope of the alleged conspiracies or location where overt acts occurred; (7) common objectives; and (8) the degree of interdependence between alleged distinct conspiracies.

Korfant, 771 F.2d at 662; *see United States v. Reiter*, 848 F.2d 336, 340 (2d Cir. 1988). Based on these factors, the court concluded that prosecution on Counts One and Two was not barred by the defendants' previous prosecutions.

On May 29, 1990, some twenty-two days after this appeal was heard, the Supreme Court announced its decision in *Grady v. Corbin*, —— U.S. ——, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990). In *Grady*, the Court held that a state prosecution for vehicular homicide was barred by the defendant's previous misdemeanor convictions for driving while intoxicated and failing to keep right of the median—conduct specified in the homicide bill of particulars to establish the element of negligence or recklessness. *Id.* 110 S.Ct. at 2094. The Court noted, however, that the prosecution would have been permissible "if the bill of particulars revealed that the State would not rely on proving the conduct for which Corbin had already been convicted." *Id.*

Grady significantly altered the jurisprudential landscape of double jeopardy, supplementing the traditional inquiry required by *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), and its progeny.[1] According to *Grady:*

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[1] At the Court's request, the parties submitted letter-briefs addressing the impact of *Grady* on the present case.

"[T]he Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove product that constitutes an offense for which the defendant has already been prosecuted." *Grady*, 110 S.Ct. at 2087. The Court rejected a "same evidence" approach, *id.* at 2093 n.12, and instead focused on the government's use of previously prosecuted conduct "to establish an essential element" of the offense charged in the second prosecution, *id.* at 2087.

This "same conduct" test applies equally to successive prosecutions in "single transaction" cases, such as *Grady* itself, and conspiracy cases. *United States v. Calderone*, 917 F.2d 717, 721 (2d Cir. 1990). In *Calderone*, a divided panel held that defendants' acquittal on charges of participating in a wide-ranging, multi-drug conspiracy barred a subsequent prosecution alleging a narrower, single-drug conspiracy. The Court reasoned that the "conduct that constitutes an offense" in a conspiracy prosecution is that conduct from which the jury may infer the existence of an agreement. *Id.* at 721. It concluded that "[u]nder *Grady*, this conduct may not be prosecuted a second time in order to establish an 'agreement' that differs from the first crime only in that the indictment happens to describe it differently." *Id.* at 721. Accordingly, the *Korfant* factors applied by the district court are inadequate to satisfy double jeopardy concerns after *Grady*. *Id.* at 721 ("To the extent that *Korfant* and our other opinions in this area conflict with *Grady*, they are no longer good law.").

With these principles in mind, we believe it appropriate to vacate the district court's order and remand for the court's consideration of whether to dismiss,

with leave to re-present, Counts One and Two of the indictment against Gambino or to order redaction of the offending portions of the indictment. Because these counts rest, at least partially, on overt acts for which Gambino has been previously prosecuted, they may not remain in the indictment against Gambino.

II. *Counts Three and Seven.*

The infirmity of Counts One and Two does not extend to Counts Three and Seven. While *Grady* announces a significant change in our approach to most successive prosecutions, we decline to read into *Grady* a disavowal of all prior double jeopardy precedent. Thus, our view on the propriety of proving previously prosecuted conduct as predicate acts in a subsequent CCE or RICO prosecution is unaltered. *See United States v. Scarpa*, 913 F.2d 993, 1014 n. 8 (2d Cir. 1990). The permissibility of such subsequent prosecutions, in cases involving alleged predicate acts occurring after the initial prosecution, is well-established in this Circuit. *See United States v. Persico*, 774 F.2d 30, 32 (2d Cir. 1985); *United States v. Amen*, 831 F.2d 373, 381 (2d Cir. 1987), *cert. denied*, 485 U.S. 1021, 108 S.Ct. 1573, 99 L.Ed.2d 889 (1988). These decisions rest on the Supreme Court's holding in *Garrett v. United States*, 471 U.S. 773, 105 S.Ct. 2407, 85 L.Ed.2d 764 (1985), that, if the government shows conduct subsequent to a prosecution, "it does not violate the Double Jeopardy Clause . . . to prosecute the CCE offense after a prior conviction for one of the predicate offenses." *Id.* at 793, 105 S.Ct. at 2418. *See also id.* at 798, 105 S.Ct. at 2421 (O'Connor, J., concurring). In other words, "[o]ne who insists that the music stop and the piper be paid at a particular point must at least

have stopped dancing himself before he may seek such an accounting." *Id.* at 790, 105 S.Ct. at 2417.

That the principles underlying *Garrett* survive *Grady* is rooted in the admonition that double jeopardy principles developed in the "classically simple situation presented in" single transaction cases not be readily transposed to the "multilayered conduct, both as to time and to place involved" in CCE and RICO cases. *Id.* at 789, 105 S.Ct. at 2416. CCE and RICO are "compound-complex felonies," *United States v. Pungitore*, 910 F.2d 1084, 1109 (3d Cir. 1990), which often cannot be charged until after their individual predicate acts have been prosecuted. *See Garrett*, 471 U.S. at 788-89, 105 S.Ct. at 2416-17 (at time of initial prosecution, "it could not then have been said with any certainty that [defendant] would necessarily go ahead and commit the other violations required to render him liable on a CCE charge"). A similar exception was addressed in *Grady:*

> We recognized in *Brown v. Ohio*, 432 U.S. 161, 169, and n. 7 [97 S.Ct. 2221, 2227, and n. 7, 53 L.Ed.2d 187] (1977), that when application of our traditional double jeopardy analysis would bar a subsequent prosecution, "[a]n exception may exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence."

Grady, 110 S.Ct. at 2090 n. 7.

This case presents just such a situation because several of the predicate acts constituting the CCE charged against Gambino and the RICO conspiracy charged against Gambino and Romano occurred after

their previous prosecutions.[2] Gambino's alleged criminal conduct, which underpins the CCE and RICO charges, continued well past his 1981 acquittal in *Gambino I*. This activity includes participating, in 1987 and 1988, in obtaining some twenty kilograms of cocaine, facilitating the escape, in 1987, of a co-defendant from INS detention in Florida, and negotiating narcotics transactions through March 1988. Romano's alleged criminal activity continued beyond his 1989 acquittal in *Adamita*, and includes participating in an extortionate credit conspiracy, using the telephone to facilitate narcotics trafficking, and continuing to conspire to import and distribute narcotics. It should be noted that this case is unlike *United States v. Russo*, 906 F.2d 77 (2d Cir. 1990) (per curiam), in which the government conceded that a subsequent prosecution for conduct that constituted predicate acts in a previous RICO conspiracy prosecution was barred. *But see United States v. Esposito*, 912 F.2d 60, 64-65 (3d Cir. 1990) (prosecution for individual predicate acts following acquittal on RICO charge not barred by double jeopardy).

Grady does not disturb this rationale. In fact, given the opportunity to expressly overrule *Garrett*, the Court in *Grady* cited the case with apparent approval. *See Grady*, 110 S.Ct. at 2090-91, 2094 n. 15; *see also Pungitore*, 910 F.2d at 1111 n. 29 ("We dismiss out of hand the possibility that *Graay* overruled *Garrett*. If the Supreme Court on such grossly dissimilar facts intended to abandon *Garrett*, we think it would have

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[2] In his letter-brief, filed at the Court's request, Gambino challenges the RICO charge on the basis that it includes, as predicate acts, conduct for which he was previously prosecuted. Though this claim was not made in Gambino's initial brief, we address it along with the identical claim of Romano.

said so. Instead, both the majority and the dissent in *Grady* cited *Garrett* without ever hinting that *Garrett* no longer was good law.").

Accordingly, Count Three's CCE charge and Count Seven's RICO conspiracy charge may properly be prosecuted under the present indictment. It should be noted that, while the prosecution of Counts Three and Seven is not barred by double jeopardy, the rules of evidence remain applicable. The district court recognized this constraint by precluding the introduction of Frank Rolli's testimony against Gambino on Count One and by "forewarn[ing]" that it would consider at trial the admissibility under Fed.R.Evid. 403 of this testimony on Count Two. We leave to the district court's wise discretion the continued application of the rules to ensure the fair prosecution of Counts Three and Seven.

CONCLUSION

For the reasons discussed above, we hold that the prosecution of Gambino on Counts One and Two is barred by double jeopardy. We further hold that the prosecution of Gambino on Count Three and the prosecution of Gambino and Romano on Count Seven is not barred by double jeopardy. Accordingly, the order of the district court is affirmed, in part, and reversed, in part, and remanded. Upon remand, the district court shall consider whether to dismiss, with leave to re-present, Counts One and Two of the indictment or to order redaction of the offending portions of the indictment.

APPENDIX B

UNITED STATES DISTRICT COURT
S.D. NEW YOR'.

No. 6th "S" Cr. 919 (PKL)

UNITED STATES OF AMERICA

v.

GIUSEPPE GAMBINO, a/k/a "JOE," ROSARIO NAIMO, a/k/a "SARO," a/k/a "DON SARO," a/k/a "SARINO," a/k/a "SAL," a/k/a "CASIMIRO DILORENZO," a/k/ "BARRY BEINER," LORENZO MANNINO, a/k/a "LORE," FRANCESCO INZERILLO, a/k/a "FRANK a/k/a "CICCIO," MATTEO ROMANO, EMANUELE ADAMITA, a/k/a "MANUELE," a/k/a "MARIO DILORENZO, "a/k/a "STEPHEN MILAZZO," JOSEPH LAROSA, a/k/a "LITTLE JOE," a/k/a "CARDILLO," SALVATORE LO BUGLIO, a/k/a "TOTO," a/k/a "THE ENGINEER," GIUSEPPE D'AMICO, a/k/a "PINO," a/k/a "JOE," SALVATORE D'AMICO, FRANCESCO CIPRIANO, a/k/a "FRANK," a/k/a "CICCIO," a/k/a "FRANCINO," SALVATORE CANDELA, a/k/a "TOTO," PAOLO D'AMICO, CARMELO GUARNERA, and JOHN DOE, a/k/a "SASHA," DEFENDANTS

Jan. 25, 1990

ORDER & OPINION

LEISURE, District Judge:

On December 14, 1989, the Grand Jury returned the sixth superseding indictment (hereinafter, the "indictment," the "pending indictment," or the "1989 indictment") against the defendants in this case.[1] The evidence presented to the Grand Jury was the result of a long-term investigation by the federal government into an international organization known as "the mafia" or "la cosa nostra." According to the government, this organization, or system of organizations, is responsible for the importation and distribution of large quantities of narcotics in violation of federal law. To supplement its income from the narcotics trade, the organization also allegedly participates in gambling, loansharking, and extortion. The government charges that murder and other acts of violence are carried out by members of the organization to facilitate its operations.

Certain of the defendants have moved the Court to dismiss the charges against them under the double jeopardy clause of the fifth amendment to the U.S. Constitution, to block the government from introducing specific evidence to the jury under the principle of collateral estoppel, to sever the defendants into separate trials, to dismiss certain counts of the indictment as being duplicitous and multiplicitous, and to suppress physical evidence seized by government

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[1] The first indictment was filed by the Grand Jury on December 14, 1988. Of the defendants charged in the sixth superseding indictment, Rosario Naimo, Paolo D'Amico and John Doe, a/k/a "Sasha," are fugitives.

agents from the homes of the defendants.[2] Rather than burden the record with an overview of the alleged facts uncovered by the government investigation, the Court will discuss specific facts in regard to the motions made by each particular defendant. First, however, a brief summary of the charges in the pending indictment is in order.

The first count of the sixth superseding indictment charges that all defendants participated in a fourteen-year conspiracy to import heroin and cocaine into the United States in violation of Sections 802, 812, 951, 952, 960(a)(1), 960(b)(1)(A) and (B), and 963 of Title 21, and Section 2 of Title 18, of the U.S. Code. This conspiracy existed and functioned from January 1, 1975, to the date of the filing of the indictment. The Grand Jury charges that responsibilities in the importation conspiracy—such as investment, international smuggling, domestic reception, storage, and primary and secondary wholesale distribution of the narcotics—were divided between defendants. Count one lists 172 alleged overt acts which refer to specific narcotics transactions, meetings and communications between defendants and other co-conspirators.

Count two of the indictment incorporates the overt acts and alleged methods employed by the conspiracy as set out in count one, and charges all defendants with a conspiracy to distribute or to possess with intent to distribute heroin and cocaine in violation of Sections 802, 812, 841(a(1) and (b)(1)(A), and 846 of Title 21, and Section 2 of Title 18, of the U.S. Code.

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[2] All the defendants before the Court filed motions asking for one or more types of relief, except for Salvatore D'Amico who filed no motions.

Count three of the pending indictment charges defendant Giuseppe Gambino with the organization and supervision of a continuing criminal enterprise in violation of 21 U.S.C. § 848(a) and (b). The indictment alleges numerous substantive violations of the narcotics laws and incorporates the violations set out in counts one and two. Defendant Gambino allegedly supervised this continuing criminal enterprise from January 1, 1975 to the date of the indictment. In count four of the indictment, defendant Rosario Naimo is charged under Section 848 in a similar fashion. Defendant Naimo is a fugitive at this time.

Count five of the indictment charges defendants Gambino, Naimo, LoBuglio, and Salvatore D'Amico with a single substantive distribution of over 100 grams of heroin on March 15, 1988. Count six charges defendants Gambino and Manino with obstruction of justice in violation of Sections 1512 and 2 of Title 18. During the period from December 1, 1988 up through the filing of the indictment, defendants Gambino and Mannino allegedly took action to intimidate and interfere with the testimony of a government informant, Giovanni Zarbano.

Count seven of the indictment charges all defendants with participating in a criminal enterprise in violation of the RICO statute, 18 U.S.C. §§ 1961-62. This enterprise allegedly existed from January 1, 1970 up to the date of the indictment. The Grand Jury charges that defendants engaged in a pattern of racketeering activity consisting of forty-two predicate acts. These acts describe alleged narcotics transactions, bribery of public officials, violations of the Travel Act, extortion, gambling, murder, and obstruction of justice.

This order and opinion is divided into three parts. First, the Court will consider the unique and complex motions of defendants Gambino, Romano, and Adamita based on the double jeopardy clause of the fifth amendment to the U.S. Constitution and the principle of collateral estoppel. Second, the Court will turn to the severance motions brought by certain of the defendants, and will discuss how the group of defendants should be divided up for trial purposes. Third, the Court will consider several motions brought by individual defendants—defendant LoBuglio's motion to suppress physical evidence, and LoBuglio's and defendant LaRosa's motions to dismiss the first two counts of the indictment as being duplicitous and multiplicitous.

I. DOUBLE JEOPARDY AND COLLATERAL ESTOPPEL

The double jeopardy clause of the fifth amendment to the U.S. Constitution provides that "[n]o person . . . shall be subject for the same offence to be twice put in jeopardy of life or limb." Courts should grant a motion for double jeopardy and thus bar the subsequent prosection when the offenses charged appear in fact and law the same. *United States v. Nersesian*, 824 F.2d 1294, 1319 (2d Cir.), *cert. denied*, 484 U.S. 958, 108 S.Ct. 357, 98 L.Ed2d 382 (1987).

The Second Circuit has held that a court must examine the totality of the circumstances in ruling on a double jeopardy motion regarding successive conspiracy prosecutions. The following factors should be considered:

> (1) the criminal offenses charged in successive indictments; (2) the overlap of participants; (3) the overlap of time; (4) similarity of operation;

(5) the existence of common overt acts; (6) the geographic scope of the alleged conspiracies or location where overt acts occurred; (7) common objectives; and (8) the degree of interdependence between alleged distinct conspiracies.

United States v. Reiter, 848 F.2d 336, 340 (2d Cir. 1988); *United States v. Korfant*, 771 F.2d 660, 662 (2d Cir.1985) (per curiam).[3] The Second Circuit has applied similar factors in determining whether successive RICO prosecutions violate the double jeopardy clause. *United States v. Russotti*, 717 F.2d 27, 33 (2d Cir.), *cert. denied sub nom. Manino v. United States*, 465 U.S. 1022, 104 S.Ct. 1273, 79 L.Ed.2d 678 (1984).

The nature of the crime of conspiracy complicates the double jeopardy inquiry. Whether the object of the conspiracy is to commit one or many crimes, it is the unlawful agreement between co-conspirators that the federal statutes punish. *Braverman v. United States*, 317 U.S. 49, 53, 69 S.Ct. 99, 101, 87 L.Ed. 23 (1942). A court must keep in mind that the same conspiracy may be established by different aggregations of proof. *United States v. Mallah*, 503 F.2d 971, 985 (2d Cir.1974), *cert. denied*, 420 U.S. 995, 95 S.Ct. 1425, 43 L.Ed.2d 671 (1975). While overt acts may be the most concrete clues in an indictment as to the nature of the underlying conspiracy, too much reliance on overt acts may confuse the proper aims of the judicial inquiry. *See id.* (*citing Short v. United States*, 91 F.2d 614, 624 (4th Cir.1937)). The government should not be permitted to divide overt acts stemming from the same con-

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[3] These factors are known as, and will be referred to in this opinion, as the "*Korfant* factors."

spiracy into different conspiracy prosecutions. *See United States v. Papa*, 533 F.2d 815, 820 (2d Cir.), *cert. denied*, 429 U.S. 961, 97 S.Ct. 387, 50 L.Ed.2d 329 (1976).

The moving defendant bears the burden of proof that a subsequent government prosecution violates the double jeopardy clause. However, the burden may switch to the government to prove distinct conspiracies if the defendant makes a sufficient showing of overlap.

> Where the Government alleges that defendants conspired with others, and there is evidence that participants of one conspiracy are acquainted with personnel in the other, that the conspiracy cannot operate without a larger organization backing it up, and that dates and geographic areas overlap, the burden of proving separate conspiracies shifts to the prosecution.

Reiter, supra, 848 F.2d at 341; *United States v. Abbamonte*, 759 F.2d 1065, 1069 (2d Cir.1985). In short, if a movant makes a sufficient showing under the *Korfant* factors, then the burden of proof switches to the government.

1. Defendant Gambino's Motions

Giuseppe Gambino argues that counts one, two, and three of the indictment should be dismissed under the double jeopardy clause. Those counts allege, respectively, that Gambino conspired from January 1, 1975 to December 14, 1988 to import and distribute narcotics, and that he engaged in and supervised a continuing criminal enterprise. In 1981, Gambino was acquitted by a jury in the Eastern District of New York on charges that he had con-

spired from August 1, 1979 to March 18, 1980 to import heroin into the United States. *United States v. Gambino*, 80 Cr. 131 (E.D.N.Y.) (Neaher, J.).[4] Gambino was charged with violating 21 U.S.C. §§ 952 (a) and 960(a)(1) and was acquitted after several days of trial.

Gambino relies on a combination of double jeopardy and collateral estoppel arguments in urging dismissal of the first three counts of the 1989 indictment. First, he argues that count one should be dismissed on "traditional" double jeopardy grounds, as it charges certain overt acts which were central to the 1981 trial and therefore alleges the same conspiracy. Second, he claims that the principle of collateral estoppel bars prosecution on count two. Third, Gambino argues that the third count of the 1989 indictment should be dismissed under the double jeopardy clause, because conspiracy to import heroin is a lesser included offense of a continuing criminal enterprise. Each of these will be considered in turn.

A. Gambino's Motions as to Count One

i. Double Jeopardy

With regard to count one, Gambino argues that "[r]arely has there ever been a case where a double jeopardy claim on a conspiracy charge is so plain." Gambino's Memorandum of Law at 10. The fact that the 1989 indictment alleges certain overt acts which were central to the government's failed proof in the 1981 trial, Gambino claims, is indisputable proof that

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[4] The Eastern District trial will be referred to as the "1981 trial." The indictment in that case will be referred to as the "1980 indictment." The indictment in the case at bar will be referred to as the "1989 indictment."

both indictments alleged the same conspiracy.[5] In his reply memorandum of law, Gambino argues that the multi-factor test of *Reiter* and *Korfant* is irrelevant, because the conspiracies are the same on the faces of the indictments.

The Court does not accept Gambino's contentions in this regard and will apply the *Korfant* factors in its analysis of Gambino's motion. To start, one of the *Korfant* factors, and therefore one of the concerns the Court must weigh, is the existence of common overt acts. *Reiter, supra,* 848 F.2d at 340; *Korfant, supra,* 771 F.2d at 662. This factor is but one of eight which the Court must consider, and is not dispositive of the entire motion. Accepting Gambino's legal position would create a large and irrational loophole in the multifactor test.[6]

Application of the *Korfant* factors to Gambino's double jeopardy motion on count one of the 1989 indictment shows insufficient similarity between the two alleged conspiracies to dismiss that count. Several of the factors do show a close relationship between the two prosecutions: both charge the importation of heroin into the United States under 21 U.S.C. §§ 952 and 960(a)(1); both involved Emanuele Adamita, as a co-conspirator in the 1981 trial and as a co-defendant in the 1989 indictment; the

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[5] The 1980 indictment charged no overt acts.

[6] The legal position put forward by Gambino's counsel would create new law. Whenever a subsequent conspiracy indictment charged overt acts which had either been charged in a previous indictment or had been part of the evidence in a previous conspiracy prosecution, then the entire subsequent conspiracy indictment would have to be dismissed. The Second Circuit has implicitly rejected this approach by considering the totality of the circumstances through the multifactor test of *Reiter* and *Korfant.*

timeframe of the 1980 indictment is contained within the timeframe of 1989 indictment; the modes of operations alleged are similar; some overt acts charged in the 1989 indictment were part of the evidence at the 1981 trial; the geographic areas alleged in the 1980 indictment are contained within those alleged in the 1989 indictment; and there were common objectives, to wit, the importation of narcotics for financial profit. Given such a showing by Gambino, the burden has indeed shifted to the government to show distinct conspiracies. *See Reiter, supra,* 848 F.2d at 341. But the Court finds that the government has sustained this burden.

Count one of the 1989 indictment charges a fourteen-year conspiracy to import both heroin and cocaine, while the 1981 prosecution alleged an eight-month conspiracy to import heroin only. The 1989 indictment lists 172 overt acts in furtherance of the conspiracy, 39 of which mention Giuseppe Gambino by name. Of those 39 acts, only 2 concern events covered in the 1981 trial. Many of the 39 acts set out in the 1989 indictment allege conversations and meetings among co-conspirators the contents and evidentiary value of which the Court is unaware. But there are also detailed allegations of narcotics transactions having no relation to the 1981 trial, including a scheme to transfer cocaine from Florida to New York undertaken after Gambino's 1981 acquittal.[7]

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[7] The existence of common overt acts which are "crucial parts of the proof of conspiracy" tends to cut across the multi-factor test and suggest a single conspiracy. *United States v. Marable,* 578 F.2d 151, 154 (5th Cir.1978). The allegations of conspiracy to import in the 1981 trial are important and substantive parts of the government's proposed proof under the 1989 indictment, yet they are not so

Of the 15 co-defendants and 27 co-conspirators in the 1989 indictment, only three, one of whom was Gambino and another a government informant, were involved in the 1981 trial.

A comparison of this case with the facts of *United States v. Reiter* demonstrates that Gambino's double jeopardy motion with respect to count one should not succeed. In *Reiter*, the defendant was indicted three times on conspiracy charges, referred to by the Second Circuit as Reiter I, Reiter II, and Reiter III. *See generally United States v. Reiter*, *supra*, 848 F.2d at 337-40. The most closely related conspiracies, eventually determined by the Second Circuit as being distinct for double jeopardy purposes, were Reiter II and Reiter III. *Id.* at 341. In both Reiter II and Reiter III, the defendant was charged with conspiring to distribute and to posess with intent to distribute narcotics, as well as with other statutory offenses. Of the sixteen defendants charged in Reiter II and seven in Reiter III, two individuals are named in both indictments. Reiter II was a four-month conspiracy contained within the timeframe of Reiter III which was a seven-year conspiracy. Though the geographic areas where the alleged events took place overlap, there was no duplication of overt acts, and, in fact, all the overt acts in Reiter III took place after the timeframe of Reiter II had ended. The Second Circuit found that the defendant Reiter had made a sufficient showing of similarity so that the burden switched to the government, but that the government had carried this burden and proven separate and distinct conspiracies. *Reiter*, *supra*, 848 F.2d at 341-42.

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crucial as to outweigh the other factors militating for denial of Gambino's claim.

Despite the insertion of certain overt acts in Gambino's 1989 indictment which were central to the 1981 trial, the Court believes that the situation at bar presents two conspiracies more distinct than Reiter II and Reiter III. In brief, the magnitude of the conspiracy alleged in the 1989 indictment overwhelms the scale of the conspiracy alleged in the 1980 indictment. The differences between Reiter II and Reiter III are less drastic. It would be a gross extension of double jeopardy protection to dismiss all of count one of the 1989 indictment, which charges fifteen defendants with a fourteen-year conspiracy to import narcotics, based on Gambino's 1981 acquittal.

ii. Collateral Estoppel

Defendant Gambino argues that if the Court decides to deny his motion to dismiss count one of the indictment on double jeopardy grounds, which the Court has done, then the Court should prevent the government from introducing any evidence of Gambino's alleged involvement in the 1980 heroin importation scheme under the principle of collateral estoppel. With regard to collateral estoppel, Judge Friendly has written:

> Application of the principle inevitably has two phases. The first is to determine what the first judgment determined, a process in which . . . the court must look not simply to the pleadings but to the record in the prior trial. The second is to examine how that determination bears on the second case.

United States v. Jackson, 778 F.2d 933, 938-39 (2d Cir.), *cert. denied*, 479 U.S. 910, 107 S.Ct. 308, 93 L.Ed.2d 282 (1986); *United States v. Kramer*, 289

F.2d 909, 913 (2d Cir.1961). A defendant asserting collateral estoppel bears the burden of establishing what factual issues the jury necessarily resolved during the first trial. *United States v. Medina*, 709 F.2d 155, 156 n. ** (2d Cir.1983). "This burden is practicularly onerous where the acquittal in the first trial involves the crime of conspiracy." *United States v. Clark*, 613 F.2d 391, 400 (2d Cir.), *cert. denied*, 449 U.S. 820, 101 S.Ct. 78, 66 L.Ed.2d 22 (1980); *United States v. Nenadich*, 689 F.Supp. 285, 292 (S.D.N.Y.1988).

The Court is sensitive to the language of the U.S. Supreme Court which has stated that

> [t]he federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archiac approach of a 19th century pleading book, but with realism and rationality.

Ashe v. Swenson, 397 U.S. 436, 444, 90 S.Ct. 1189, 1194, 25 L.Ed.2d 469 (1970); *see also United States v. Citron*, 853 F.2d 1055, 1058 (2d Cir.1988) (stating that a court should not make the defendant's burden overly difficult by postulating "hypertechnical and unrealistic" grounds on which the jury could have rested). In a close case, a court may weigh the equities of allowing a subsequent prosecution. *See United States v. Mespoulede*, 597 F.2d 329, 335 (2d Cir.1979). "For whatever else that constitutional guarantee [against double jeopardy] may embrace . . . , it surely protects a man who has been acquitted from having to 'run the gauntlet' a second time." *Ashe v. Swenson, supra*, 397 U.S. at 445-46, 90 S.Ct. at 1195.

The bulk of the prosecution's evidence in Gambino's 1981 trial consisted of the direct testimony of

Frank Rolli, a government informant who allegedly conspired with Giuseppe Gambino and Emanuele Adamita to import heroin from Italy into the United States. Rolli testified that he met twice with Gambino and Adamita in Brooklyn during March, 1980, and that the three men discussed a plan to smuggle approximately ten kilograms of heroin through customs at Kennedy Airport. (Transcript of 1981 Eastern District trial ("1981 trial Tr.") at 103-13, 126-31). Rolli testified that Gambino agreed to pay him $30,000 for his assistance (1981 trial Tr. at 112). Rolli and Adamita then travelled to Italy at which time Rolli became aware that the quantity of heroin to be imported had risen to nearly forty kiolgrams. According to Rolli, Gambino had said at one of their Brooklyn meetings that he would be in contact with "his friends" regarding the final amount to be imported (1981 trial Tr. at 403-04). At oral argument, counsel for defendant Gambino suggested that Gambino was thus aware of the change in the size of the shipment (Transcript of oral argument before the Court, Dec. 28, 1989 ("Oral Argument Tr.") at 47-48). The heroin was seized at Kennedy Airport and Gambino was subsequently arrested, tried, and acquitted.

In their briefs and at oral argument, counsel for the government and for defendant Gambino presented markedly different interpretations of the jury's acquittal. The government claims that the jury's verdict was based on the lack of proof that Gambino knowingly and intentionally joined the 40 kilogram importation conspiracy which was charged in the 1980 indictment. The government focuses on the fact that Rolli's meetings with Gambino both occurred when the quantity of heroin was expected to be 10

kilograms or less. Thus the government argues that it should not be estopped from introducing evidence that Gambino conspired to import the smaller shipment initially envisioned.

Counsel for Gambino view the jury's verdict of acquittal more broadly. They argue that the jury, viewing the evidence presented to it with regard to Gambino's involvement in the importation conspiracy, found that Gambino simply had no involvement with the plan. They urge the Court not to read between the lines of the verdict and not to find that the jury made a distinction between the 10 kilogram shipment initially discussed and the 40 kilogram shipment eventually carired out. Gambino's 1981 acquittal should be interpreted as a finding of complete non-involvement with the importation conspiracy.

The Court believes that while Gambino's argument is overstated,[8] the government should be barred from introducing proof of Gambino's alleged involvement in the 1980 importation conspiracy, as set out in overt acts 11-18 of the 1989 indictment, for the purposes of proving count one of the indictment during the upcoming trial. As Mr. Panzer, co-counsel for

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[8] It would be improper for the Court to rule that the 1981 verdict demonstrates Gambino's total non-participation with the alleged 1980 importation scheme. Depending on the facts required to prove the particular offense charged, the Court could permit subsequent prosecutions based on the 1980 scheme. For example, the government might be entitled to use the same testimony in order to establish another crime—aiding and abetting—at a second trial. *See United States v. Jackson*, 778 F.2d 933, 940 (2d Cir.), *cert. denied*, 479 U.S. 910, 107 S.Ct. 308, 93 L.Ed.2d 282 (1986); *United States v. Clark*, 613 F.2d 391, 402 (2d Cir.), *cert. denied*, 449 U.S. 820, 101 S.Ct. 78, 66 L.Ed.2d 22 (1980) (conspiracy acquittal does not bar subsequent prosecution for substantive offense).

defendant Gambino, stated at oral argument, the verdict seemed to come down to the question of the credbility of the witnesses. (Oral Argument Tr. at 22). Though the Court will not conjecture as to whether the jury believed the testimony of defendant Gambino or the deposition of Emanuele Adamita, the testimony of informant Frank Rolli was successfully attacked by Gambino's 1981 trial counsel.

Most all of the government's case in the 1981 trial rested on the testimony of Rolli who met with Gambino and Emanuele Adamita twice in Brooklyn allegedly to arrange for the heroin shipment. In viewing the transcript of Rolli's testimony, the Court believes that credibility problems overshadowed the substance of the testimony. First, Rolli testified on cross examination that everything Gambino had said during both Brooklyn meetings added up to no more than 15 to 20 minutes of conversation. (1981 trial Tr. at 267-68). Second, Rolli admitted to stealing goods on more than one occasion while working for Alitalia Airlines at Kennedy Airport, and to threatening to kill his supervisor, presumably to prevent exposure (1981 trial Tr. at 239-40, 243, 245). Rolli denied stealing specific other goods, such as leather jackets, watches, and a gold bar, and selling them from a boutique on 18th Avenue in Brooklyn. (1981 trial Tr. at 240-43). Third, Rolli admitted to burning his car, to lying under oath to an insurance company, and to collecting $9000. (1981 trial Tr. at 246-54). Fourth, Rolli testified that government investigators had attached an eavesdropping device to his person prior to both his meetings with Gambino, but that he had ripped the devices off on both occasions and had thus not preserved recordings of the incriminating conversations (1981 trial Tr. at 98, 126).

These significant weaknesses with the testimony of the government's chief witness demonstrate that the 1981 jury simply did not believe that the government had sustained its burden of proving Gambino's guilt beyond a reasonable doubt. It is certainly possible that the jury might have found Gambino guilty of conspiring to import 10 kilograms of heroin, while it felt there was insufficient evidence to convict him for conspiring to import 40 kilograms. Yet the Court believes that such a conclusion would represent precisely the "hypertechnical and archaic approach" to collateral estoppel which the Supreme Court warned against in *Ashe v. Swenson*, *supra*, 397 U.S. at 444, 90 S.Ct. at 1194. It is only just and fair for the Court to rule that the government should not be able to reintroduce proof of the 1980 importation scheme in its attempt to convict Gambino of conspiring to import narcotics under the 1989 indictment.

B. Gambino's Motions as to Count Two

i. Double Jeopardy

Gambino also moves for dismissal of count two of the 1989 indictment on double jeopardy grounds. Count two charges a fourteen-year conspiracy to distribute or to possess with intent to distribute narcotics in violation of 21 U.S.C. § 841. Count two incorporates the same 172 overt acts as set out in count one. Gambino's motion to dismiss all of count two on double jeopardy grounds must fail for the same reasons that his motion to dismiss count one has failed. In addition, the charging of a distinct statutory offense, distribution rather than importation, further distinguishes the 1989 indictment from the 1980 indictment. *See Albernaz v. United States*, 450 U.S.

333, 344 n. 3, 101 S.Ct. 1137, 1145 n. 3, 67 L.Ed.2d 275 (1981) ("It is well settled that a single transaction can give rise to distinct offenses under separate statutes without violating the Double Jeopardy Clause." (citations omitted)).

ii. Collateral Estoppel

Gambino also moves the Court to bar the government from introducing evidence of the 1980 importation scheme to prove the distribution conspiracy charged in count two of the 1989 indictment. To grant Gambino's motion, the Court would have to find that the 1981 jury's verdict of acquittal for conspiracy to import also by necessity meant an acquittal for conspiracy to distribute. The Court did rest its decision to bar the government from introducing evidence of the 1980 importation scheme on the fact that it believed that credibility problems with the government's chief witness, Frank Rolli, lay behind the jury's verdict. This might lead the Court to rule that any testimony by Rolli, whether to show a conspiracy to import or to distribute, would be incredible.

The Court is hesitant, however, to apply the principle of collateral estoppel when different charges, requiring the proof of different facts, are alleged by the government. Looking behind the rationale of the 1981 jury's verdict is one matter; deciding how the 1981 jury would have come out on a distinct factual issue is another. Thus the Court will allow the government to introduce evidence of the 1980 scheme to prove count two of the 1989 indictment.[9]

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[9] The parties are forewarned that the Court will have to consider the admissability of evidence of the 1980 scheme to

C. Gambino's Motions as to Count Three

i. Double Jeopardy

Defendant Gambino moves the Court to dismiss count three of the 1989 indictment against him on double jeopardy grounds. Count three charges that Gambino was engaged in and supervised a continuing criminal enterprise in violation of 21 U.S.C. § 848. Gambino argues that since the Court should dismiss the first two counts of the indictment on double jeopardy grounds—those alleging conspiracies to import and distribute narcotics—count three must be dismissed as well. As the Court did not decide to dismiss either of the first two counts on double jeopardy grounds, Gambino's motion to dismiss the third count on those grounds must fail.

ii. Insufficient Quantity of Narcotics

Gambino argues that if the Court rules to bar the government from introducing proof of the 1980 importation scheme at trial, then the government has not fulfilled the minimum-quantity requirements of 21 U.S.C. § 848. Under 21 U.S.C. § 848(b)(2)(A), the government must prove that the defendant engaged in a continuing criminal enterprise involving at least 30 kilograms of heroin or 150 kilograms of cocaine if it wishes to seek life imprisonment or

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prove count two of the indictment under Fed.R.Ev. 403 due to the potential undue prejudicial effects to defendant Gambino. The Court will also have to consider a limiting instruction to the jury, including explanation of the facts concerning Gambino's 1981 acquittal, to be certain that the jury will be able to compartmentalize the evidence and apply it only towards the counts of the indictment for which it was admitted to prove.

heavy fines under § 848(a). *See* 21 U.S.C. §§ 848(b)(2)(A), 841(b)(1)(B). According to Gambino, if the government is collaterally estopped from introducing evidence of the 1980 importation scheme, then this minimum-quantity requirement cannot be met.

It is, however, up to the jury to decide whether the government has proven beyond a reasonable doubt that a defendant has engaged in a continuing criminal enterprise involving 30 kilograms of heroin or 150 kilograms of cocaine. If the jury convicts Gambino of involvement with less than the minimum amounts, then the time would be ripe for a sufficiency argument by the defendant. *See* Government Memorandum of Law at 52 n. *. The government has alleged in the indictment numerous narcotics transactions, the details of which will be presented to and weighed by the jury. Thus Gambino's motion to dismiss count three of the indictment must fail.

2. Defendant Romano's Motions

A. Double Jeopardy Motions as to Counts One and Two

On March 31, 1988, Matteo Romano and 27 others were charged with conspiracy to import and distribute narcotics. SS 88 Cr. 217 (JES) (hereinafter "Romano I").[10] The indictment charged a three-year conspiracy, commencing on January 1, 1985 and ending on June 30, 1988, and cited 105 overt acts occurring in New York City and other locations in the Eastern United States. Romano was eventually tried with thirteen co-defendants in the Southern District of New York and acquitted in early 1989. Romano

[10] The trial was officially called *United States v. Adamita.*

now argues that his acquittal in Romano I precludes his prosecution under the pending indictment on double jeopardy grounds.

Both Romano and the government admit to the relevance of the *Korfant* factors in determining whether the offenses charged in Romano I and the current indictment are in fact and law the same. The parties put forward, however, markedly different characterizations of the two prosecutions against defendant Romano. The Court will undertake a detailed examination of the indictment and trial in Romano I as compared with counts one and two of the pending indictment in light of the *Korfant* factors.

The statutory offenses charged in the Romano I indictment and the first two counts of the 1989 indictment are very similar. While the importation and distribution of narcotics are alleged in a single count in the Romano I indictment, they are split into separate counts in the 1989 indictment. The only substantial difference is that the Romano I indictment charged a conspiracy to export controlled substances under 21 U.S.C. § 953. Also, in addition to charging violations involving heroin and cocaine, the Romano I indictment charges the defendants with the distribution of marijuana. On the whole, however, the Court views the offenses charged in the two indictments as essentially similar.

There is an overlap in the alleged participants in the two indictments. The Romano I trial charged 14 defendants and referenced 67 co-conspirators, while the 1989 indictment charged 14 defendants and referenced 27 co-conspirators. Out of these participants, there are three common defendants and 18 common co-conspirators. This overlap in personnel demonstrates that certain of the participants in the two

alleged conspiracies are indeed "acquainted." *See Reiter, supra,* 848 F.2d at 341. However, the fact that the majority of named co-defendants and co-conspirators in the two indictments do not overlap shows that the indictments charge two essentially different groups of individuals.

The defendants common to both indictments are Matteo Romano, Emanuele Adamita, and Joseph La-Rosa. The Court takes note, as the government pointed out at oral argument, that the allegedly central figures of the conspiracy charged in the 1989 indictment—Giuseppe Gambino, Rosario Naimo, and Lorenzo Mannino—were not mentioned in the Romano I indictment or trial.[11] Thus while the con-

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[11] Counsel for defendant Romano point to a picture of Matteo Romano, Emanuele Adamita, and Giuseppe Gambino which was admitted into evidence at the Romano I trial as showing that Gambino was involved in the conspiracy charged in the Romano I indictment. The government argues in response that Gambino was never identified for the jury, and that for double jeopardy purposes the picture of Gambino is irrelevant. The question arises, at this time and at others, what should be central to the Court's inquiry—what was received into evidence for the jury to consider, or what actual similarities existed between the conspiracies. On the one hand, the Second Circuit has shown great concern over the ability of the government to divide the same conspiracy into separate chunks of proof in order to dilute the risk of an adverse jury verdict. *See United States v. Papa, supra,* 533 F.2d at 820; *United States v. Mallah, supra,* 503 F.2d at 985. On the other hand, defense counsel should not be given complete license to introduce evidence of the similarity between the conspiracies that was not touched on in either the prior indictment or at trial. It is, after all, the conspiracy for which the defendant was previously tried which is relevant to the double jeopardy inquiry. The Court will consider, however, arguments by counsel as to the similarity between the

spirators charged in the two indictments do overlap, the leaders of the conspiracies are distinct.

In terms of modes of operation and objectives, the conspiracies are similar as well. Both employed human couriers to smuggle narcotics from Europe into the United States, though at times the conspiracy alleged in the pending indictment sent narcotics concealed in commercial packages. When the narcotics arrived in the United States, it was part of both conspiracies that they would be transferred to secondary wholesale distributors, who at often times would dispense them using legitimate businesses as fronts. In the Romano I trial, these businesses were usually pizza parlors and in one instance a clothing store. In the 1989 indictment, the government charges the use of a furniture store, a Brooklyn cafe, and construction sites for the storage and distribution of narcotics. To facilitate the narcotics trade, both conspiracies employed pay telephones, codes, threats, and acts of violence. The objectives of both conspiracies were to sell narcotics to enrich their members.

The parties dispute the degree to which the two alleged conspiracies overlap in time. On the faces of the indictments, Romano I charged a conspiracy to import and distribute narcotics stretching from January 1, 1985 to June 30, 1988, while the conspiracy charged in the 1989 indictment allegedly existed from January 1, 1975 up to the filing of the indictment on

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conspiracies, even if such evidence was not admitted into evidence and shown to the jury. But in this instance, the Court does not consider that a single photograph of Gambino, Romano, and Adamita standing in front of Concord Furniture, Romano's furniture store, carries much weight in showing that the two conspiracies at issue are similar for double jeopardy purposes.

December 14, 1988. Counsel for defendant Romano argue, however, that the identity of the timeframe is greater than the three and one-half years evident from the faces of the indictments, as the government in Romano I actually introduced evidence in that case stretching back to the mid-1970's. Counsel claim that "nearly every overt act charged in the [1989] indictment before January 1, 1985 was part of the evidence at the Romano I trial." (Defendant Romano's memorandum of law at 16).

The government vigorously contests this attempted expansion of the scope of the Romano I conspiracy. The government claims that evidence of narcotics dealing before 1985 was admitted in Romano I solely for purposes of impeachment, and that Judge Sprizzo specifically instructed the jury not to rely on any evidence of pre-1985 dealing in deciding whether the conspiracy charged in the indictment existed. In reply, counsel for Romano argue that regardless of whether the evidence was admitted to the jury for probative purposes, it still goes to the central question before the Court—are the two conspiracies charged one and the same?

As stated in footnote 11 above, though the Court will consider all information put forward by defendant Romano which demonstrates the similarity between the conspiracies, the Court will focus its inquiry on the evidence received at trial in Romano I and the conspiracy which the government actually tried to prove in that case to support the charges in the Romano I indictment. The Court therefore does not give great weight to the evidence of drug transactions prior to 1985. Furthermore, those transactions as brought out during the testimony of Filippo Ricupa do not necessarily demonstrate the existence of the

same conspiracy stretching back to the mid-1970s. Thus the Court agrees with the government that the overlap in time between Romano I and the 1989 indictment is three and one-half years only.[12]

A comparison of the geographic scopes of the two alleged conspiracies shows some similarity but also some significant differences. The majority of conspiratorial acts in both indictments occurred in the vicinity of 18th Avenue in Brooklyn. In addition, acts are alleged to have taken place in Italy and along the U.S. Eastern seaboard in Washington, D.C. and Philadelphia. The 1989 indictment alone refers to activities in Florida, involving cocaine transactions and the escape of Emanuele Adamita from immigration detention. These more recent alleged criminal activities in Florida suggest a dimension of the conspiracies alleged in the 1989 indictment wholly lacking in the Romano I indictment.

Romano argues that six overt acts are repeated word for word in both indictments, and that 26 of the acts alleged in the 1989 indictment were explicitly part of the evidence at the first trial. The government admits to three principal areas of overlap between the overt acts alleged in the 1989 indictment and the proof introduced during the Romano I trial.

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[12] The government points to statements made by Judge Sprizzo and Mr. Shargel, counsel for defendant Romano both during Romano I and in the case at bar, which might indicate that the transactions testified to by Ricupa and the conspiracy alleged in the Romano I indictment were unrelated. It is more likely that those comments simply referred to the fact that evidence of pre-1985 transactions was not admissable to prove the conspiracy alleged in the indictment, rather than a decision by the judge, or an admission by Mr. Shargel, that the conspiracy could never be shown to exist before 1985 for double jeopardy purposes.

First, overt acts 24-32 of the 1989 indictment allege an importation scheme using couriers and smuggled packages of heroin which operated from February, 1985 through March, 1986. The scheme was run by at least three individuals who were co-conspirators in both cases. Second, overt acts 48-56 and 58-63 of the 1989 indictment charge Emanuele Adamita, a defendant in both cases, with narotics transactions. Some of the overt acts are repeated word for word in both indictments. Third, overt acts 54 and 55 of the 1989 indictment allege that two defendants in Romano I, who are named co-conspirators in the 1989 indictment, discussed and executed the delivery of a kilogram of cocaine to Concord Furniture, Matteo Romano's furniture store on 18th Avenue in Brooklyn.

This significant overlap of factual events draws the Court's attention to the close relationship between the two alleged conspiracies. However, a close examination of the 1989 indictment shows that the great bulk of the acts alleged by the government, and the evidence it intends to introduce at trial, have not yet been brought before a jury. Some of the most significant chunks of alleged conspiratorial activity not part of Romano I are all of the pre-1985 narcotics transactions, the commencement of cocaine transactions, involving Florida sources (overt acts 35-40), the escape of Emanuele Adamita from immigration detention in Florida (over acts 41-47), Romano's narcotics transactions involving co-conspirator Paolo Rizzuto in December 1987 and January 1988 (overt acts 64-68), and the extensive use of the Caffe Giardino for narcotics transactions after the final Romano I indictment had been handed down (overt acts 86-172). Both the large absolute number of alleged conspiratorial

activities not considered in Romano I, and that number relative to the activities which were considered in Romano I, suggest to the Court that the two conspiracies are different for double jeopardy purposes.

The Court believes that this case presents a slightly closer case than the comparison between the Reiter II and Reiter III conspiracies in *United States v. Reiter*, *supra*, 848 F.2d 336, discussed in detail above with regard to defendant Gambino's double jeopardy motion. There is undoubtedly a connection between the two conspiracies. Yet current caselaw, most specifically the totality of the circumstances approach set out in *Korfant* and *Reiter*, allows the government to proceed with a subsequent conspiracy prosecution even when there is some overlap with a prior trial. Given the large scale of organized crime at this time, it would be impractical for our concept of "one conspiracy" to be so broad as to block subsequent prosecutions when any connection between conspiracies can be shown by the defense. Therefore, defendant Romano's motion to dismiss the first two counts of the indictment against him on double jeopardy grounds is denied.

B. Double Jeopardy Motion as to Count Seven

Count seven of the indictment charges a RICO conspiracy under 18 U.S.C. § 1962. The count alleges that the defendants acted together as an enterprise as defined in 18 U.S.C. § 1961(4) and committed 42 predicate acts of racketeering. Defendant Romano is mentioned in 9 of the 42 alleged predicate acts. He argues that these 9 acts "almost exclusively involve conduct previously at issue in the 21 U.S.C. 846 conspiracy prosecuted in *United States v. Adamita, et al.* (Romano I)." (Defendant Romano's memorandum

of law at 34). Romano claims that under the double jeopardy clause, these acts cannot be used as predicate offenses against him in a subsequent RICO prosecution. The government contests Romano's characterization of count seven of the indictment, arguing that the predicate acts allege significant criminal activity by Romano not considered in Romano I.

Though the Second Circuit has not yet reached the issue, several other circuits have held that the RICO statute creates a separate offense for double jeopardy purposes. *See United States v. Hartley*, 678 F.2d 961, 992 (11th Cir.), *cert. denied*, 459 U.S. 1170, 103 S.Ct. 815, 74 L.Ed.2d 1014 (1983); *United States v. Aleman*, 609 F.2d 298, 306 (7th Cir.), *cert. denied*, 445 U.S. 946, 100 S.Ct. 1345, 63 L.Ed.2d 780 (1980); *United States v. Rone*, 598 F.2d 564, 571 (9th Cir. 1979). The Second Circuit has held, however, that cumulative sentencing under 21 U.S.C. § 846 and the RICO statute is not violative of double jeopardy. *United States v. Thomas*, 757 F.2d 1359 (2d Cir.), *cert. denied, sub nom. Fisher v. United States*, 474 U.S. 819, 106 S.Ct. 66, 88 L.Ed.2d 54 (1985) (*citing Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)). Judge Newman's dissent in *Thomas*, on the other hand, opposed the imposition of cumulative sentencing on the grounds that a violation of § 846 could under certain circumstances be viewed as a lesser included offense of a § 1962 RICO conspiracy. *Thomas, supra*, 757 F.2d at 1373. Romano argues that when the factual basis for the § 846 and § 1962 violations are similar, a court should consider the § 846 violation as a lesser included offense of the § 1962 charge, and thus bar a subsequent § 1962 prosecution on double jeopardy grounds.

In *United States v. Persico*, 774 F.2d 30, 32 (2d Cir.1985), the Second Circuit held that prior substantive acts for which the defendants had been convicted could serve as predicate acts in a subsequent RICO indictment. In *Persico*, however, other of the alleged predicate acts had taken place after the defendants had entered guilty pleas in the prior lawsuit. The Second Circuit specifically refused to state that continued post-plea involvement in a criminal enterprise was necessary to avoid a double jeopardy bar to a subsequent RICO prosecution.[13] In a subsequent proceeding, the Second Circuit again refused to create such a requirement. *United States v. Persico*, 832 F.2d 705, 711 (2d Cir.), *cert. denied*, 486 U.S. 1022, 108 S.Ct. 1995, 100 L.Ed.2d 227 (1988).[14]

In the case at bar, however, the Court finds upon its own examination of count seven of the indictment, significant criminal activity allegedly carried out by Romano was not considered in Romano I. Thus the Court need not decide whether substantive narcotics

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[13] The District Court had stated that "there could be serious double jeopardy problems" if no post-plea or post-conviction predicate acts were charged in the indictment. *United States v. Persico*, 620 F.Supp. 836, 843 (S.D.N.Y.1985) (Keenan, J.).

[14] *See also Garrett v. United States*, 471 U.S. 773, 791-95, 105 S.Ct. 2407, 2417-20, 85 L.Ed.2d 764 (1985) (in a case where the defendant was first convicted for a substantive narcotics law violation and then prosecuted for engaging in a continuing criminal enterprise under 21 U.S.C. § 848 using the prior conviction as a predicate act, the Court did not reach the issue of whether continued post-conviction violation of § 848 is necessary to avoid a double jeopardy bar). In concurrence, Justice O'Connor stated: "Certainly the defendant's interest in finality would be more compelling where there is no indication of continuing wrongdoing after the first prosecution." *Id.* at 799, 105 S.Ct. at 2422.

charges and RICO charges will always be distinct for double jeopardy purposes. The predicate acts in count seven charge criminal activity by Romano both before and after the scope of the conspiracy alleged in Romano I. For example, predicate act five relates to a 1982 heroin distribution by Romano to Filippo Ragusa; predicate act seventeen charges a 1987 heroin distribution by Romano to Candela; predicate act thirty-three charges Romano's involvement with a bribery scheme by which Emanuele Adamita escaped from immigration detention in Florida; and predicate acts thirty-four and thirty-six charge Romano with extortion and threats of murder. Thus five of the nine predicate acts allege activities not considered before in a judicial proceeding against Romano. In addition, predicate acts one and two allege the fourteen-year importation and distribution conspiracies which the Court has found do not violate the double jeopardy clause. Therefore, only two of the nine predicate acts which mention Romano have been considered in judicial proceedings before, one during Romano I and one for which Romano was tried and convicted in a 1982 trial in the Eastern District of New York. Given these factual circumstances, the Court finds that prosecution of Romano under count seven of the pending indictment does not violate the double jeopardy clause.

3. Defendant Adamita's Motions

Defendant Emanuele Adamita moves the Court to dismiss the indictment against him under the double jeopardy clause, and to sever him from the other defendants for trial. The Court will consider the double jeopardy motions in this section and the severance motion in the section *infra*. Adamita argues

that his indictment with Giuseppe Gambino in 1980 in the Eastern District of New York, his conviction for narcotics dealing in 1980 in Italy, and his indictment in 1985 in *United States v. Adamita, et al.*, SS 88 Cr. 217 (JES), create a double jeopardy bar to his prosecution under the 1989 indictment.

At the outset, the Court notes that double jeopardy protection only attaches when there has been a final conviction or acquittal in the first prosecution. *Richardson v. United States*, 468 U.S. 317, 325, 104 S.Ct. 3081, 3086, 82 L.Ed.2d 242 (1984) ("[T]he protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as acquittal, which terminates the original jeopardy," (citations omitted)). Thus the Court does not consider that Adamita's motions based on his mere indictments in the Eastern District in 1980 and the Southern District in 1985 create any double jeopardy obstacles to prosecution under the pending indictment. Adamita was never tried with Gambino under the 1980 indictment, because he was a fugitive. Adamita pled guilty to four counts of the 1985 Southern District indictment and then withdrew his guilty pleas to three of the counts. The fourth count, for which Adamita was sentenced, is not detailed by counsel for defendant Adamita, and the Court assumes that it has no bearing on Adamita's double jeopardy motions. Thus the Court will consider in detail only the double jeopardy effects of Adamita's 1980 conviction in Italy.

The narcotics transaction for which Adamita was convicted and incarcerated in Italy is identical to that which is set out in overt acts 11-18 in the 1989 indictment. This is the same heroin importation plot for which Adamita was indicted in 1980 in the East-

ern District of New York, and for which Giuseppe Gambino was tried and acquitted in 1981. Adamita argues that his conviction in Italy should block his prosecution under the 1989 indictment.

Adamita argues that 18 U.S.C. § 4111 provides him with double jeopardy protection as if he had been tried previously in a United States federal court.[15] This statute has been interpreted as affording the same protection to criminal defendants as the double jeopardy clause of the fifth amendment. *United States v. Fontanez*, 869 F.2d 180, 183 (2d Cir.1989); *United States v. Patterson*, 812 F.2d 1188, 1191 (9th Cir.), *cert. denied*, 485 U.S. 922, 108 S.Ct. 1093, 99 L.Ed.2d 255 (1985). However, the protection of § 4111 can only be invoked when a defendant has been transferred to the United States pursuant to a prisoner exchange treaty. 18 U.S.C. 4100(a). Adamita makes no suggestion that he was transferred to the United States under any such treaty. In fact, the government alleges that he escaped to the United States when on leave from prison in Italy.

The government argues that Adamita's subsequent criminal prosecution in the United States should be permissible under the dual sovereignty doctrine, and that no double jeopardy protection from the Italian conviction should attach. Under the dual sovereignty doctrine, whenever a defendant, in a single act, vio-

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[15] Section 4111 provides in part that:

> An offender transferred to the United States shall not be detained, prosecuted, tried, or sentenced by the United States, or any State thereof for any offense the prosecution of which would have been barred if the sentence upon which the transfer was based had been by a court of the jurisdiction seeking to prosecute the transferred offender, . . .

lates the "peace and dignity" of two separate sovereigns by breaking the laws of each, he commits two distinct offenses. *See Heath v. Alabama*, 474 U.S. 82, 88, 106 S.Ct. 433, 437, 88 L.Ed.2d 387 (1985); *Abbate v. United States*, 359 U.S. 187, 193-94, 79 S.Ct. 666, 669-70, 3 L.Ed.2d 729 (1959). The Court is aware of no case, however, which applies the dual sovereignty doctrine to subsequent prosecution by different independent nations.

Whether or not Adamita is deserved of double jeopardy protection stemming from his Italian conviction, application of the doctrine to Adamita's case would mandate nearly identical conclusions as the Court reached with regard to Giuseppe Gambino above. Even assuming that the Italian trial covered the same events in overt acts 13-18, while Gambino's 1981 trial only covered the events in overt acts 13-15, the Court must rule that Adamita's prosecution under the pending indictment should not be barred under the double jeopardy clause. A detailed application of the *Korfant* factors to Adamita's motion would be similar as to Gambino's motion. The Court will not repeat the analysis here.

Defendant Adamita has asked to join in the motions made by his co-defendants, and thus the Court will consider the potential collateral estoppel effects of Adamita's 1980 conviction in Italy. Adamita has not explicitly argued the existence of a collateral estoppel bar to introduction of evidence of the 1980 drug transaction allegedly carried out by Adamita, Giuseppe Gambino, government informant Frank Rolli, and other named co-conspirators. The only description which counsel for Adamita gives the Court with regard to the Italian proceedings is the following:

> In Italy, in 1980, the defendant, Emanuele Adamita, was charged with the following: crimes of common association to commit crimes, association to commit crimes aimed at drug trafficing [sic], and possession of 40.610 kg. of heroin. He was convicted of all charges and incarcerated from 1980 to 1987. This same matter is contained in the case at bar in the sections entitled: "The February-March Plot to Smuggle 7 kilograms of Heroin," and "The Planned Importation is Increased to 40 kilograms."

Defendant Adamita's memorandum of law at 2. Aside from one reference equating the Italian charges to United States conspiracy and RICO law, *id.* at 4, there is absolutely no attempt to make a detailed showing as to what the 1980 Italian conviction means in collateral estoppel terms. As stated above with regard to defendant Gambino, a defendant bears the heavy burden of establishing what the first jury necessarily decided. *United States v. Clark*, *supra*, 613 F.2d at 400; *United States v. Nenadich*, *supra*, 689 F.Supp. at 292. There is no attempt made by Adamita's counsel to bear this important burden. For example, Adamita's counsel makes no effort to show the Court whether the nature of the Italian charges would block subsequent prosecution for conspiring to import or distribute, or engaging in a RICO enterprise. Thus the government is free to introduce proof of the alleged 1980 drug transaction in its case against Emanuele Adamita.

II. SEVERANCE

All the defendants except for Giuseppe Gambino and Matteo Romano have moved the Court for sev-

erance from the main trial and thus an individual prosecution.[16] Rather than deal with defendants' severance motions on an individual basis, the Court will first lay out the general legal framework in intends to follow, and will then discuss and justify its decision as to how to try the defendants. The Court believes that this approach is proper due to the repetitiveness of many of the arguments for and against severance, and due to the macro-level case management concerns recently set out by the Second Circuit in *United States v. Casamento*, 887 F.2d 1141 (2d Cir.1989).

As an initial matter, the Court notes that motions to sever under Fed.R.Crim.P. 14 are "committed to the sound discretion of the trial judge," and that it is a defendant's "heavy burden" to:

> show facts demonstrating that he will be so severly prejudiced by a joint trial that it would in effect deny him a fair trial. The defendant must demonstrate that he suffered such prejudice as a result of joinder, not that he might have had a better chance for acquittal at a separate trial.

United States v. Chang An-Lo, 851 F.2d 547, 556 (2d Cir.1988) (citations omitted). *See also United States v. Nersesian*, 824 F.2d 1294, 1303 (2d Cir.), *cert. denied*, 484 U.S. 957, 108 S.Ct. 355, 98 L.Ed.2d 380 (1987) (burden of showing substantial prejudice amounting to a "miscarriage of justice"); *United*

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[16] Defendant Salvatore D'Amico did not file any motions. As will be discussed below, however, the Court has chosen to sever him from defendants Gambino and Romano, the only others not requesting severance.

States v. Bari, 750 F.2d 1169, 1177 (2d Cir.), *cert. denied sub nom. Benfield v. United States*, 472 U.S. 1019, 105 S.Ct. 3482, 87 L.Ed.2d 617 (1985); *United States v. Wilkinson*, 754 F.2d 1427, 1435 (2d Cir.), *cert. denied sub nom. Shipp v. United States*, 472 U.S. 1019, 105 S.Ct. 3482, 87 L.Ed.2d 617 (1985); *United States v. Potamitis*, 739 F.2d 784, 791 (2d Cir.), *cert. denied*, 469 U.S. 934, 105 S.Ct. 332, 83 L.Ed.2d 269 (1984).[17]

Generally, where "defendants . . . are jointly indicted [they] should be jointly tried." *United States v. Ventura*, 724 F.2d 305, 312 (2d Cir.1983). This is particularly true where the crime charged involves a common scheme or plan. *See United States v. Turoff*, 853 F.2d 1037, 1042-43 (2d Cir.1988); *United States v. Girard*, 601 F.2d 69, 72 (2d Cir.), *cert. denied*, 444 U.S. 871, 100 S.Ct. 148, 62 L.Ed.2d 96 (1979). The Supreme Court has unequivocally recognized that "[j]oint trials play a vital role in the criminal justice system." *Richardson v. Marsh*, 481 U.S. 200, 209, 107 S.Ct. 1702, 1708, 95 L.Ed.2d 176 (1987).

The Second Circuit has recently given guidance to district courts in deciding severance motions in large-scale criminal trials such as the one at bar. In *United States v. Casamento*, 887 F.2d 1141, 1152 (2d Cir. 1989), the Second Circuit ruled that the burden of proof for severance motions should switch to the prosecution when certain size limitations are reached. The Court held that when the government's case will last more than four months, the prosecutor should

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[17] Though these cases set out the appellate standard for review of district court decisions, they highlight to district courts the underlying concerns of severance motions.

"present a reasoned basis to support a conclusion that a joint trial of all the defendants is more consistent with the fair administration of justice than some manageable division of the case into separate trials for groups of defendants." *Id.* When the government's case will last more than four months and is brought against more than ten defendants, then the prosecutor should make "an especially compelling justification for a joint trial. . . ." *Id.* In making a showing for a joint trial, the court should weight the interests of the prosecution, the defendants, the jurors, the court, and the public. *Id.*

The current case is brought against 15 defendants, 12 of whom are before the Court, and the government has estimated that its case will take some six months to present to the jury. Under *Casamento*, the burden is clearly on the government to show "an especially compelling justification for a joint trial." The Court holds that the government has not carried the burden of justifying a joint trial of all 12 defendants. The major theme of the government's opposition to defendants' severance motions—that all defendants have worked closely together in the same narcotics conspiracy—is insufficient to warrant a single trial.

The Court does recognize, however, that group trials are in this instance superior to 12 separate trials. First, the government does indeed have an interest in prosecuting the case in a similar fashion as it was presented to the Grand Jury. Co-conspirators should be tried together whenever feasible. Second, the government and the public have an interest in as quick and efficient a resolution of the charges as possible. Contrary to the assertions of some defense counsel at oral argument, the Court believes that these goals

are best achieved through group trials.[18] Third, stress on the witnesses will be lessened by minimizing the total number of trials. Keeping the number of times that certain key witnesses must repeat their testimony will also reduce the relative advantage accruing to defendants who are tried at later dates and who can benefit from knowledge of the contents and weaknesses of witnesses's testimony.

The Court therefore rules that the 12 defendants before the Court pursuant to the 1989 indictment will be severed into two groups for purposes of trial. One group will consist of defendants Giuseppe Gambino, Lorenzo Mannino, Francesco Inzerillo, Matteo Romano, and Emanuele Adamita ("Group A"). The other group will consist of defendants Joseph LaRosa, Salvatore LoBuglio, Giuseppe D'Amico, Salvatore D'Amico, Francesco Cipriano, Salvatore Candela, and Carmelo Guarnera ("Group B"). The Court is, of course, unable to make a division which perfectly satisfies the principal concerns of efficiency and fairness. But it believes that this division into two groups of roughly equal size best achieves those objectives.

A major concern of the Court was to divide the defendants into groups which would minimize the quantity of evidence not pertaining to a particular defendant which that defendant would have to sit through. Thus the Court grouped defendants depending on the extent of overlapping evidence based on the face of the indictment, especially the overt acts. Group A consists of individuals alleged to be

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[18] Jury selection alone in cases of this type can be prolonged and thus add greatly to the time spent on separate trials.

leaders of the conspiracy and active from its start in the mid-1970s. They are the only defendants listed in the first 34 overt acts of the indictment, except for the fugitive Rosario Naimo. Overt acts 41-74, which concern Emanuele Adamita's escape from immigration detention in Florida, his alleged return to the narcotics trade in New York, and Matteo Romano's drug trafficking, likewise mention only Group A members, except for two references to Joseph LaRosa in overt acts 56-57. Though the interaction between Group A and Group B members increases over time, Group A represents an alleged core of conspirators operating a variety of illegal enterprises out of the Caffe Giardino. Finally, the alleged acts of violence, especially the murders, were most all allegedly committed by Group A members. Though the Court is aware that certain Group A members (Francesco Inzerillo, for example) are not accused of any violent acts, division into two groups does minimize the prejudicial spillover effects of alleged acts of violence.

Group B consists of what the government refers to in overt acts 9 and 10 as "secondary wholesale distributors" or those who "oversaw and facilitated the transportation, smuggling and storage of multiple kilogram quantities of narcotics . . . ." Group B generally has less cohesion than Group A in terms of overlapping evidence. Yet the Court is unwilling to divide into even smaller trials a group of individuals who were found by the Grand Jury as participating together in a single narcotics conspiracy. The division made by the Court should significantly reduce the time spent by certain defendants listening to evidence with no relation to their case, and minimize the prejudicial spillover effects of being tried in one large group.

III. OTHER MOTIONS

1. Motions to Dismiss for Duplicity and Multiplicity

Defendants Joseph LaRosa and Salvatore LoBuglio move the Court to dismiss the first two counts of the indictment as being duplicitous and multiplicitous. First, the defendants argue that the first two counts of the indictment charge more than one conspiracy and that they are therefore duplicitous. Second, they argue that since the first two counts refer to identical transactions, it would violate the rule against multiplicitous charges by subjecting a defendant to prosecution under both counts. Each of these arguments will be considered in turn.

Under Fed.R.Crim.P. 7(c), the government is permitted to charge one or more specified means of committing a criminal offense in a single count of an indictment. Rule 7(c) allows that two or more acts, each of which would constitute an offense standing alone, may be joined in a single count where "the offenses joined bear a relationship to one another and may be said to constitute a continuing course of conduct. . . ." *United States v. Pavloski*, 574 F.2d 933, 936 (7th Cir.1978). A count of an indictment should only be ruled impermissibly duplicitous when the policy goals underlying the doctrine are offended—to wit, if a general verdict of guilty might actually conceal contrary findings as to different alleged crimes, or if an appropriate basis for sentencing is not provided. *United States v. Margiotta*, 646 F.2d 729, 732-33 (2d Cir.1981).

Defendants LaRosa and LoBuglio argue that their extremely minor roles in the alleged conspiracies demonstrate by necessity the existence of more than one conspiracy. It is true that neither defendant is

mentioned in any overt act occurring before 1986. The government argues in response that the two defendants are contesting "what is strictly a matter of proof, not pleading." Government memorandum of law at 140. The Court agrees that in this case, the government should be permitted to go to trial on the pending indictment. Only after the Court has been made more aware of the evidence will it be in a position to decide whether counts one and two are impermissibly duplicitous.

The government is not allowed to divide into two or more counts what should have properly been charged in a single count. To allow the government to bring multiple counts where only one should have been charged would unfairly affect the defendant at sentencing. The test for determining whether two offenses are sufficiently distinct to allow the government to bring separate charges under different statutes is set forth in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932):

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether eacch provision requires proof of a fact which the other does not. . . .

See Albernaz v. United States, 450 U.S. 333, 337-38, 101 S.Ct. 1137, 1141-42, 67 L.Ed.2d 275 (1981); *United States v. Biasucci*, 786 F.2d 504, 514-16 (2d Cir.), *cert. denied*, 479 U.S. 827, 107 S.Ct. 104, 93 L.Ed.2d 54 (1986). The rule is clearly set that conspiracies to import and distribute narcotics are properly charged separately. *See United States v. Benevento*, 836 F.2d 60, 72 (2d Cir.1987). Even when the

overt acts pertaining to one conspiracy are incorporated into the charge for a second conspiracy, the charges are properly brought separately.

2. Defendant LoBuglio's Suppression Motion

Salvatore LoBuglio moves the Court to suppress physical evidence seized from his home on December 1, 1988 pursuant to a warrant issued by Judge Mark A. Costantino. LoBuglio argues that while the warrant stated that the affiant, Special Agent John G. Nemec, Jr., had reason to believe that evidence related to illegal drug transactions were hidden at LoBuglio's home, a close examination of the supporting affidavit reveals no such basis for a finding of probable cause to search LoBuglio's home.

Special Agent Nemec's affidavit describes LoBuglio's associations with alleged mafia members and his familial relationship to two convicted heroin dealers. More specifically, the affidavit sets forth the facts of LoBuglio's meetings, conversations and heroin transactions with an undercover agent working out of Buffalo, New York, and LoBuglio's frequentings of the Caffe Giardino. Special Agent Nemec details his experience as an FBI Special Agent assigned to the Organized Crime Drug Enforcement Task Force and states that his belief is based on his "training, experience, participation in other narcotics investigations, and discussions with other narcotics investigators."

To be valid, a search warrant must be supported by a showing of probable cause that evidence of criminal activity will be found during the search. "[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Illinois v. Gates*, 462 U.S.

213, 244 n. 13, 103 S.Ct. 2317, 2335 n. 13, 76 L.Ed.2d 527 (1983). The belief that there is probable cause need not "be correct or more likely true than false." *Texas v. Brown*, 460 U.S. 730, 742, 103 S.Ct. 1535, 1543, 75 L.Ed.2d 502 (1983); *United States v. Travisano*, 724 F.2d 341, 346 (2d Cir.1983). "The process does not deal with hard certainties, but with probabilities. . . . [T]he evidence . . . must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *Texas v. Brown*, *supra*, 460 U.S. at 472, 103 S.Ct. at 1543.

The Court hereby finds that Special Agent Nemec's affidavit did provide probable cause for Judge Costantino's issuance of the search warrant for defendant LoBuglio's home. First-hand knowledge of the fact that evidence of drug trafficking was to be found at LoBuglio's residence was not necessary for the warrant to issue. Rather, Judge Costantino had to decide, based on Special Agent Nemec's affidavit, that under the totality of the circumstances, probable cause existed that evidence of criminal activity would be found at LoBuglio's home. *See Illinois v. Gates*, *supra*, 462 U.S. at 241, 103 S.Ct. at 2333. What was known about LoBuglio at that time, coupled with his relationship to organized crime family members, provided this probable cause. Defendant LoBuglio's motion to suppress the evidence seized from his home on December 1, 1988 is denied.

CONCLUSION

Defendant Giuseppe Gambino's motions to dismiss the first, second, and third counts of the indictment against him on double jeopardy ground are denied. Defendant Gambino's motion to bar the government

from introducing evidence of the 1980 heroin importation scheme, alleged in overt acts 11-18, to prove count one of the indictment against him on collateral estoppel grounds is granted. Defendant Gambino's motion to bar the government from introducing evidence of the 1980 heroin importation scheme, alleged in overt acts 11-18, to prove count two of the indictment against him is denied.

Defendant Matteo Romano's motions to dismiss counts one, two, and seven of the indictment against him are denied.

Defendant Emanuele Adamita's motions to dismiss the indictment against him on double jeopardy grounds is denied.

Pursuant to the severance motions of defendants Lorenzo Mannino, Emanuele Adamita, Francesco Inzerillo, Joseph LaRosa, Salvatore LoBuglio, Guiseppe D'Amico, Francesco Cipriano, Salvatore Candela, and Carmelo Guarnera, the defendants will be divided into two groups for trial. One group will consist of defendants Giuseppe Gambino, Lorenzo Mannino, Francesco Inzerillo, Matteo Romano, and Emanuele Adamita. The other group will consist of defendants Joseph LaRosa, Salvatore LoBuglio, Giuseppe D'Amico, Salvatore D'Amico, Francesco Cipriano, Salvatore Candela, and Carmelo Guarnera.

The motions of defendants Joseph LaRosa and Salvatore LoBuglio to dismiss the first two counts of the indictment against them on the grounds of duplicity and multiplicity are denied.

Defendant Salvatore LoBuglio's motion to suppress physical evidence seized from his home pursuant to a warrant on December 1, 1988 is denied.

SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of December, one thousand nine hundred and ninety.

Present: HON. FRANK X. ALTIMARI, C.J.
HON. J. DANIEL MAHONEY, C.J.
HON. MILTON POLLACK, D.J.*

90-1104, -1106

UNITED STATES OF AMERICA, APPELLEE

v.

GIUSEPPE GAMBINO, a/k/a "JOE" and
MATTEO ROMANO, DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the

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* Hon. Milton Pollack, US District Court Judge for the Southern District of New York, sitting by designation.

Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now ordered, adjudged, and decreed that the Order of said District Court be and it hereby is affirmed in part, reversed in part and remanded to the said District Court for further proceedings in accordance with the opinion of this Court.

ELAINE B. GOLDSMITH
Clerk

By: /s/ Edward J. Guardaro
EDWARD J. GUARDARO
Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 1st day of February, one thousand nine hundred and ninety.

Present: Hon. FRANK X. ALTIMARI,
HON. J. DANIEL MAHONEY,
Circuit Judges.

HON. MILTON POLLACK,
District Judge.

Docket No. 90-1104(L)
90-1106

UNITED STATES OF AMERICA, APPELLEE

v.

GIUSEPPE GAMBINO, a/k/a "JOE," and
MATTEO ROMANO, DEFENDANTS-APPELLANTS

A petition for a rehearing having been filed herein by Appellee UNITED STATES OF AMERICA

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk

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Supreme Court, U.S.
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(2)

No.: 91-31

IN THE

Supreme Court of the United States

October Term, 1991

UNITED STATES OF AMERICA,
Petitioner,

-against-

GIUSEPPE GAMBINO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR GIUSEPPE GAMBINO IN OPPOSITION

JOHN L. POLLOK, ESQ.
Attorney for Respondent
260 Madison Avenue
New York, New York 10016
(212) 679-2900

QUESTION PRESENTED

1. Whether respondent's 1981 acquittal on a heroin importation conspiracy charge, which covered a period of eight months, bars prosecution under the double jeopardy clause of the Constitution, of broadened charges of conspiracies to import and distribute narcotics when the latter conspiracies have subsumed the former and the conduct proved in the first prosecution will be used to prove the essential element of "an agreement" in the latter prosecution.

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No.: 91-31

IN THE

Supreme Court of the United States

October Term, 1991

UNITED STATES OF AMERICA,

Petitioner,

v.

GIUSEPPE GAMBINO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR GIUSEPPE GAMBINO IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet.App. 1a-14a) is reported at 920 F.2d 1108. The decision of the District Court (Pet.App. 15a-58a) is reported at 729 F.Supp. 9541.[1]

1. References in parentheses refer to the appropriate pages of petitioner's appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on December 10, 1990. The petition for rehearing was denied on February 1, 1991. On April 22, 1991, Justice Marshall extended petitioner's time for filing its writ of certiorari until July 1, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT

1. On August 30, 1989 the respondent Gambino was charged in six counts of a sixth superseding indictment (6S 88 Cr. 919 PKL) which alleged, *inter alia,* various violations of the narcotics laws. Count One charged that Gambino participated in a conspiracy to import narcotics in violation of 21 U.S.C. §963. Count Two charged that the same activities also amounted to a conspiracy to possess narcotics with an intent to distribute it in violation of 21 U.S.C. §846. Count Three, which incorporated Counts One and Two, alleged that Gambino engaged in a continuing narcotic enterprise in violation of 21 U.S.C. §848(a) and (b). Count Five alleged that the respondent participated in a March 15, 1988 sale of heroin in violation of 21 U.S.C. §841(a)(1) and (2). Count Six charged that he obstructed justice in connection with the testimony of a former co-defendant in violation of 18 U.S.C. §1503. Finally, Count Seven alleged that these crimes together with various travel act violations constituted a pattern of racketeering activity in violation of 18 U.S.C. §1962 ("RICO").

More particularly, the narcotics importation and distribution conspiracies (Counts One and Two) alleged that the importation conspiracy commenced in January, 1975, when unindicted co-conspirators Filippo Ragusa and

Filippo Ricupa "smuggled in excess of $100,000 in United States currency from the United States to Sicily, Italy." (Indictment at 9) Thereafter, the indictment makes the following allegations:

* * *

"In or about February, 1980, Filippo Ragusa and Filippo Ricupa smuggled in excess of $250,000 from the United States to Sicily, Italy.

In or about March, 1980, in Milan, Italy, Filippo Ragusa requested Filippo Ricupa to assist Ragusa and his associates in smuggling a quantity of heroin, secreted in a suitcase, into the United States from Milan, Italy.

On or about March 9, 1980, Giuseppe Gambino and Emanuele Adamita met with Frank Rolli at the Cafe Mille Luci on 18th Avenue in Brooklyn, New York.

On or about March 11, 1980, Giuseppe Gambino and Emanuele Adamita met with Frank Rolli in the Villa Borghese Restaurant in Brooklyn, New York.

On or about March 14, 1980, Emanuele Adamita and Frank Rolli traveled from New York City to Milan, Italy.

* * *

On or about March 15, 1980, Emanuele Adamita, Filippo Adamita and Filippo Rieupa, among others, met at the II Vecchio 400 Restaurant in Milan, Italy.

On or about March 18, 1980, Emanuele Adamita, and co-conspirators Antonio Adamita

> and Domenico Adamita delivered 40.61 kilograms of heroin, secreted in zinc containers, to Jumbo Freight Forwarding in Milan, Italy for shipment to "Centro Nastri Italian Distributors on 18th Avenue in Brooklyn, New York." (Indictment 9-10)

2. The above-described allegations which formed the linch-pin of the government's 1989 conspiracy charges were remarkably familiar to Mr. Gambino. In March of 1981, Mr. Gambino was tried and acquitted in the case of *United States v. Giuseppe Gambino, et al.,* 80-CR-131 (E.D.N.Y.). The indictment in that case alleged:

> From on or about August 1, 1979 until March 18, 1980, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants Rosario Gambino, Giuseppe Gambino, Emanuele Adamita, Antonio Adamita, Luigi LoBue, Salvatore Gallina, Giuseppe Vallelunga, Fortunato Inzone, Antonio Silvestrini and Paul Zinerco, together with others known and unknown to the Grand Jury, did knowingly and intentionally combine, conspire, confederate and agree to violate Section 841(a)(1) of Title 21, United States Code.
>
> 1. It was part of said conspiracy that the defendants and others would import into the United States from places outside thereof large quantities of heroin, a Schedule 1 narcotic drug controlled substance.
>
> 2. It was further part of said conspiracy that the defendant would conceal the existence of the conspiracy and would take steps designed to

prevent disclosure of their activities. (Title 21, United States Code, Section 846).

(Appendix in Court of Appeals) (A: 117-18)

Although the indictment in the earlier prosecution is vague, the proof at that trial, as demonstrated by the government's opening statement, makes it unequivocally clear that the allegations in the 1989 indictment are the same allegations for which Mr. Gambino stood trial in 1981:

> [T]he Government will prove the following:
>
> The evidence you will hear in this case will show the existence of a scheme, a plan, a conspiracy, if you will, to import over 40 kilograms or about 90 pounds of nearly pure heroin, with a wholesale value of approximately ten million dollars in the United States, from Italy into the United States.
>
> The evidence will also show, ladies and gentlemen, that this scheme was supervised, directed and financed by the defendant sitting at that table, Giuseppe Gambino.
>
> Ladies and gentlemen, you will have the opportunity in this case to hear how this plan was hatched, how it developed and how it ultimately failed, when those 40 grams of heroin were seized by the Italian National Police near Milan, Italy, on March 18, 1980. And you will get this insider's view, ladies and gentlemen, of this international narcotics conspiracy because during the time that the conspiracy was unfolding one of its central figures was an Italian Airlines employee name [sic] Frank Rolli.

* * *

Now, the evidence you will hear begins to unfold on March 3, 1980 when Rolli was on duty performing his duties as a cargo agent at the cargo facility at Alitalia Airlines at John F. Kennedy Airport. And on that day Frank Rolli received a telephone call from an individual known to him as Emmanuel Adamita.

* * *

And Adamita suggested to Rolli during that telephone call that they meet later on that day, and that is March 3rd.

* * *

Now, March 3rd was a Monday and some time later during that week, that is the week of March 3rd, Adamita again called Rolli at work and he confirmed a meeting for Sunday, March the 9th at the Cafe Mille Luci.

On Sunday, March 9, Rolli proceeded to the Cafe Mille Luci around noontime and he was again accompanied by and kept under surveillance by agents of the Drug Enforcement Administration. And when he arrived at the Cafe Mille Luci and went inside, Adamita was waiting for him. And Adamita said that they were waiting for someone. So he and Adamita chatted for a few minutes. And after a few minutes the defendant Giuseppe Gambino entered the Cafe Mille Luci and approached the table where Adamita and

Rolli were sitting, and Adamita introduced Giuseppe Gambino to Frank Rolli as Joe. And Joe suggested that there were too many people in the Cafe Mille Luci and that they go somewhere else to talk.

So they went to a diner on Kings Highway in Brooklyn, which you will hear was the Del Rio Diner.

They went in several cars. Rolli went in his own car and Adamita and the defendant Gambino followed in the defendant Gambino's car.

And once there Adamita told Rolli to repeat to Joe what Rolli had told him the previous Monday about how the heroin should be packaged and shipped from Italy to New York.

And Rolli, repeated in essence what he had said, and he described the commercial shipment, how it should be packaged, how it should be labeled and what should go in the boxes and the fact that they needed legitimate invoices to accompany the boxes.

* * *

So they left it at the end of the meeting, ladies and gentlemen that Rolli would be contacted by Adamita within a few days.

And sure enough, ladies and gentlemen, on Tuesday, March 11th Adamita again called Rolli

at his place of work and another meeting at the Cafe Mille Luci was set for that evening.

At approximately 8:00 p.m. Rolli arrived at the Cafe Mille Luci, and met with Adamita and again Rolli was being surveilled by agents of the drug enforcement administration. And Rolli and Adamita, after a few minutes left the Mille Luci and went to the Villa Borghese Restaurant which is on Bath Avenue in Brooklyn. And at the Villa Borghese Restaurant the defendant Giuseppe Gambino was waiting for them inside the restaurant and they had dinner. At this meeting, ladies and gentlemen, you will hear that the plans for the trip by Rolli and Adamita to Milano was finalized.

The defendant Joe Gambino agreed to pay Rolli the $30,000 he had asked for. And he told Adamita to come to his place in New Jersey the next day and to get money to give Rolli as an advance payment.

The defendant Gambino told Rolli and Adamita that they were going to make the shipment as large as possible and that Adamita would be contacted in Milan as to the exact amount of the shipment, but that it would be at least eight to ten kilos.

And finally, ladies and gentlemen, among other things they finalized their departure date for Friday, March 14, 1980.

* * *

And that on that same evening he and Adamita got on an Alitalia Airlines flight and flew to Milan together.

* * *

And later that Saturday, March 15th Rolli registered in the Hotel Astoria, which is located in another small town near Milan named Busto Arsizio.

And about 11:00 p.m. that evening Emmanuel and Antonio Adamita came to Rolli's hotel and they brought to Rolli the unexpected news that rather than eight to ten kilo shipment, they expected the shipment was in fact to be forty kilos of heroin. And Emanuel Adamita told Rolli that he had learned that news at a meeting he had attended that evening in Milan in a restaurant.

* * *

And later on that Monday evening they began to weld the heroin which had been delivered to Antonio Adamita's garage in forty-two separate packages. They began rolling the heroin and placing it in the containers and welding the containers shut. And they soon discovered that they didn't have enough room in the two containers that they purchased earlier that day to package all the heroin. So they suspended operations for that evening, and the following morning they went out and they bought another smaller container in which the rest of the heroin

was to be placed. And they also went back to the record store that they visited the day before and bought a large number of record albums and music tapes, cassettes or eight track tapes that were to be put in with the shipment.

They then returned to Antonio Adamita's garage where they completed welding the heroin in the now three containers and they packed four boxes.

Though the boxes you will hear, ladies and gentlemen, contained the metal containers with the lids welded on top, inside a box. Inside another box and between the two boxes were placed pieces of styrofoam and the record albums. And there was a top on the box. And the boxes were addressed to Centro Nostra Italian Distributors, which is located at 7414 18th Avenue in Brooklyn, New York.

Now, the fourth box, ladies and gentlemen, which was smaller than the other three, contained only record albums. And this was the box, ladies and gentlemen, that Rolli had earlier indicated was the one that was to be presented to Customs. And it was also smaller so that it could be immediately identified from the other three.

And then Antonio Adamita and Frank Rolli loaded these boxes in a truck and they took them to Jumbo Freight Forwarders, which is located in a small town again near Milan, named Gallarate (phonetic).

> And they gave the shipment to the Jumbo Freight Forwarders. They paid for its transport to New York. And they returned to Antonio Adamita's house to celebrate.
>
> (Court of Appeals Appendix 119-134).

3. Prior to trial, Gambino moved to dismiss the first three counts of the indictment and to bar proof that he participated in a 1980 plan to import and distribute heroin from Milan, Italy (6a 229-329). Though the District Court (Leisure, J.) granted Gambino's motion to bar proof on collateral estoppel grounds that he conspired to import heroin in 1980, it denied the defendant's motion in all other respects including his claims under the double jeopardy clause (35a-37a). Gambino, pursuant to *Abney v. United States,* 431 U.S. 651, 97 S.Ct. 2034 (1977), appealed to the United States Court of Appeals for the Second Circuit.

On December 10, 1990, a panel of the Second Circuit held that *Grady v. Corbin,* _____U.S._____ , 110 S.Ct. 2084 (1990), and the double jeopardy provisions of the Fifth Amendment of the Constitution barred prosecution of Gambino on Counts One and Two but not on Counts Three (CCE) and Seven (RICO).[2] The court directed that "upon remand, the district court shall consider whether to dismiss, with leave to re-present Counts One and Two of the indictment or to order

---

2. Gambino has filed a petition for writ of certiorari as to that aspect of the Second Circuit's decision which declined to bar prosecution of the counts of his indictment under 21 U.S.C. §848 and 18 U.S.C. §1962. That petition is presently pending before this Court No. 90-1689.

redaction of the offending portions of the indictment." *United States v. Gambino,* 920 F.2d 1108, 1114 (2d Cir. 1990); (16a).

Gambino sought rehearing *en banc* solely with regard to the court's decision permitting prosecution of him on Count Three and the admission of evidence of the 1980 importation on Counts Three and Seven. The government filed a cross petition, challenging the court's conclusion that consideration of prior jeopardy compelled dismissal or re-presentation of Counts One and Two. The cross petitions were denied.

In reaching its conclusion that Counts One and Two should be barred as pleaded, the court below relied on *Grady v. Corbin,* _____U.S._____ , 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990) which the Court of Appeals believed "significantly altered the jurisprudential landscape of double jeopardy." Applying the holding of *Grady* to conspiracy cases as well as to single-act offenses, the court below held that the double jeopardy clause bars a subsequent prosecution "if, *to establish an essential element* of an offense charged in that prosecution, the government *will prove conduct* that constitutes an offense of which the defendant has already been prosecuted." 110 S.Ct. at 2087 (emphasis supplied). The court below, citing *United States v. Calderone,* 917 F.2d 717, 721 (2d Cir. 1990) reasoned that "the conduct that constitutes an offense in a conspiracy prosecution" is that conduct from which the jury may infer the existence of an agreement.

Relying on *Grady,* the court below therefore found that Gambino's "conduct may not be prosecuted a second time in order to establish an 'agreement' that differs from

the first crime only in that the indictment happens to describe it differently." *Calderone* at 721, quoting *Grady.*

The court below concluded that, because Counts One and Two rest, at least partially, on overt acts for which respondent had been previously prosecuted, they may not remain in the indictment against him. The Court ordered that upon remand, the District Court should consider whether to dismiss, with leave to re-present, Counts One and Two of the indictment or to order redaction of the offending portions of the indictment.

ARGUMENT

1. *Grady v. Corbin,* _____U.S._____, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), a case which "significantly altered the jurisprudential landscape of the double jeopardy clause" of the Fifth Amendment to the Constitution, mandates that the government's petition be denied. In *Grady,* this Court supplemented the traditional test of double jeopardy announced in *Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 182 (1932) by adding a "same conduct" rule. This test "bars a subsequent prosecution if *to establish* an essential element of an offense charged in that prosecution, the government will prove *conduct* that constitutes an offense for which the defendant has already been prosecuted." 110 S.Ct. at 2087.

Application of *Grady* to the instant prosecution compels the conclusion that Counts One and Two of Gambino's indictment as presently constituted should be dismissed. Here the government seeks to use Gambino's *conduct* from August 1, 1979 to March 18, 1980, a critical time frame in the prior prosecution, to establish Gambino's participation in the conspiracies charged in

Counts One and Two. That is, they are using his conduct to establish his agreement (an essential element of this prosecution) to import and possess with intent to distribute narcotics. Here, as in *Grady,* the government has admitted it will attempt to prove conduct -- the acts underlying a conspiracy to import narcotics -- for which Gambino has already been prosecuted in order to establish the conspiratorial agreement necessary for a conviction. Here, as in *Grady,* the government, if it chose, could have indicted Gambino without relying on conduct for which Gambino had previously been prosecuted by, for example, omitting from its grand jury presentation that conduct which was the subject matter of his 1981 acquittal.[3]

2. The heart of the government's position is that *Grady* should not be applied to successive conspiracy prosecutions. The government's attempt to limit *Grady* to its facts is flawed for two reasons: first, it improperly narrows the scope of this Court's decision, and, second, it mischaracterizes the nature of the essential elements necessary to convict for conspiracy (See pet.br. p. 7).

Nothing in the *Grady* opinion suggests that it is a response to a relatively limited number of cases. Instead, as the Second Circuit has noted in *United States v. Calderone,* 917 F.2d at 721, the opinion was concerned with the dangers of multiple trials and the inadequacy of the *Blockburger* test to guard against these dangers. Moreover, as the *Calderone* court observed, *Grady*'s '"same conduct' test is described in inconclusive generally

3. Indeed, petitioner concedes that Gambino's conduct in 1979 and 1980 deals with only two of 41 overt acts in his present prosecution. While this conduct is critically important, its omission would not sound a death knell to the prosecution's case.

applicable terms throughout the opinion.... Indeed the opinion is structured so that it first declares a general rule and then applies that rule to the facts of the case." *Id.* at 721 (citations omitted)

According to the petitioner, the "conduct that constitutes an offense" in conspiracy cases is "the agreement or confederation of the conspirators to commit one or more unlawful acts," (pet.br. p. 7 citing ***Braverman v. United States,*** 317 U.S. 4, 53 (1942)), rather than the specific conduct from which the agreement can be inferred. Therefore, it claims, it will not establish an essential element of the later prosecution by proving the conduct of Gambino in the conspiracy for which he was previously acquitted.

The petitioner is incorrect for a number of reasons. First, as the Second Circuit noted in *Calderone,* the government may not reprosecute an "agreement" simply by describing it differently:

> To begin with, the "agreement" in nearly all conspiracy prosecutions is not proved directly, such as by testimony of conspirators that "we agreed to sell narcotics." Rather, the "agreement" is simply alleged, and to prove its existence the government presents evidence of the conspirators' conduct -- what they said and did -- and asks the jury to infer from this conduct that the criminal agreement has been established. The conduct in most conspiracy cases, as was the conduct in *Adamita,* is the focus of the case. Under *Grady,* this conduct may not be prosecuted a second

> time in order to establish an "agreement" that differs from the first crime only in that the indictment happens to describe it differently.

Second, in *Grady* Justice Brennan was careful to define "an essential element of an offense" in terms of "*conduct* that constitutes an offense for which the defendant has already been prosecuted." The court specifically excluded "'actual evidence' or the 'same evidence'" 110 S.Ct. at 2093. In short, here and in *United States v. Felix,* 926 F.2d 1522 (10th Cir. 1991) *cert. pending* No. 90-159, the petitioner seeks an abrogation of *Grady*'s "same conduct" test and the adoption of a "same evidence" test *under Blockburger v. United States,* 284 U.S. 299, 52 S.Ct. 180 (1932). See *Grady,* 110 S.Ct. at 2093, fn.12.

Third, if the petitioner's position were adopted, the government could, if it chose, prosecute individuals for conspiracy, fail in its attempt, and reprosecute for the same conspiracy by simply recasting "the agreement" but relying on the same conduct to infer the new agreement. *See Green v. United States,* 355 U.S. 184, 187-188, 78 S.Ct. 221, 223-224 (1957) and *United States v. Abbamonte,* 759 F.2d 1065, 1068 (2d Cir. 1985) and cases cited therein.

3. The government requests that its petition be granted to the extent of holding it pending action in *United States v. Felix,* No. 90-1599. Though respondent believes that it would be appropriate for this Court to affirm the decision of the Court of Appeals for the Tenth Circuit in *United States v. Felix, supra,* we also believe that it would be inappropriate to hold this petition pending action on the government's petition for a writ of certiorari in that case. *Felix* is factually distinguishable (See Govt's Petition for Certiorari in *United States v. Felix,* at pp. 2-4).

In *Felix*, the defendant was first prosecuted and convicted for the substantive offense of attempting to manufacture methamphetamine in August, 1987. Thereafter, he was prosecuted for conspiracy to violate the narcotics laws and seven substantive narcotics offenses *excluding* his prior attempt conviction. In this case, the issues are much more limited and involve successive conspiracy prosecutions where the conduct used to infer the essential element of an agreement is precisely the same in both prosecutions. On the other hand, the relevant conduct in *Felix* was an attempt with successive substantive offenses. Thus, unlike the instant case, *Felix* is concerned with the principles of collateral estoppel as indicated in *Ashe v. Swenson*, 397 U.S. 436 (1970) and that decision's interrelationship to *Grady*. *See Dowling v. United States*, 110 U.S. 6 (1990). This petition, however, concerns only the application of *Grady* to successive conspiracy prosecutions.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: New York, New York
August 16, 1991

Respectfully submitted,

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No. 91-31

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

GIUSEPPE GAMBINO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. In our petition, we asked the Court to hold this case pending its disposition of *United States* v. *Felix*, No. 90-1599. Respondent argues that this case should not be held for *Felix*, because this case, unlike *Felix*, involves "successive conspiracy prosecutions where the conduct used to infer the essential element of an agreement is precisely the same in both prosecutions." Br. in Opp. 17.

The fact that *Felix* involved a conspiracy prosecution following a substantive prosecution, while this

case involves successive conspiracy prosecutions, does not distinguish the legal issue presented in the two cases. In each case, the court of appeals held that the "conduct" at issue in a conspiracy prosecution, for purposes of applying this Court's holding in *Grady* v. *Corbin*, 110 S. Ct. 2084 (1990), consists of the actions of the defendant from which the government asks the jury to infer the conspiracy. Applying that principle, the Tenth Circuit in *Felix* held that the conduct charged in an indictment for conspiracy was the same as that which had been charged in a prior prosecution on a substantive charge, while the Second Circuit in this case held that the conduct charged in an indictment for conspiracy was the same as that charged in a prior prosecution on a conspiracy charge. Because both courts appealed to the same underlying principle—a principle that in our view is inconsistent with settled law concerning the crime of conspiracy and the application of the Double Jeopardy Clause—this Court's disposition of *Felix* is likely at least to shed substantial light on the resolution of this case.

2. Petitioner also asserts that the issues in this case are "much more limited" than those in *Felix*. Br. in Opp. 17. To be sure, the court of appeals in *Felix* barred prosecution on both conspiracy and substantive charges, while the court of appeals in this case barred prosecution on only a conspiracy charge. Thus, *Felix* does involve questions not presented by this case concerning the application of the Double Jeopardy Clause to successive prosecutions on substantive charges. Nonetheless, that fact does not suggest that this case should not be held pending this Court's disposition of *Felix*. As argued above, one of the questions presented in *Felix* is raised here as

well, and it is therefore appropriate to hold this case pending disposition of *Felix*.*

Respectfully submitted.

KENNETH W. STARR
Solicitor General

SEPTEMBER 1991

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* Petitioner asserts that "unlike the instant case, *Felix* is concerned with the principles of collateral estoppel as indicated in *Ashe* v. *Swenson*, 397 U.S. 436 (1970) and that decision's interrelationship to *Grady*." Br. in Opp. 17. The collateral estoppel doctrine applies only where an issue of fact has been decided in a prior proceeding in favor of the party invoking the doctrine. See *Dowling* v. *United States*, 110 S. Ct. 668, 673-674 (1990). Since the defendant in *Felix* was convicted in his prior prosecution, no issue of fact can be said to have been decided in his favor in that proceeding. Consequently, the collateral estoppel doctrine has no application in *Felix*.

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